Labor Standards Act (29 U.S.C. §213(b)(1)) from the payment of time and a half wage payment for hours worked in excess of 40 per week.

Interstate commerce is a practical concept derived from the normal course of business, and the designation of travel as either interstate or intrastate must be measured by a common sense concept of transportation. It is well settled that a "special arrangement" may harmonize the concepts of business and transportation into the single concept of interstate commerce such that all segments of an excursion within the time and continuity of the interstate journey as a whole. In *Charter Limousine v. Dade County Board of Commissioners*, 678 F.2d 586 (Former 5th Cir. 1982), the former Fifth Circuit Court of Appeals held that prearrangement of specific segments of travel within one state, which are part of a larger journey between states, is sufficient to bring a carrier's operations within the stream of interstate commerce. The Third Circuit, however, held in our instant case that absent a contractual agreement between the intrastate carrier and the air, train or motor carrier who actually transports passengers across state lines, there can be no interstate commerce. Both the Fifth Circuit and the Third Circuit, in our present case, interpret the Third Circuit's previous decision in *Southerland v. St. Croix Taxicab Association*, 315 F.2d 364 (3rd Cir. 1963; interpreting the Supreme Court's holding in *Yellow Cab*, supra.) to support diametrically opposed conclusions.

Further, the Third Circuit ignored the fact that the Petitioner herein, PTC, provides service under the auspices of the ADA and the DOT, clearly bringing its operations under the control of the Secretary of Transportation and, therefore, within the exemption to the Fair Labor Standards Act set forth at 29 U.S.C. §213(b)(1).

Congress, through its Commerce Clause power, has directed the DOT to promulgate regulations to implement Part B of

Title II of the ADA. The DOT's jurisdiction is limited to transportation and the regulation of interstate commerce. The ADA mandates that all fixed route passenger carriers must provide paratransit service to the disabled as a compliment to that fixed route service. ACCESS was formed and is operated by the Port Authority of Allegheny County in response to the constitutional mandate of Part B of Title II of the ADA. The Third Circuit's finding in our instant case fails to recognize the fact that Congress, through the Commerce Clause, has the right to grant the Secretary of Transportation jurisdiction over transportation provided under the ADA. The Congressional grant of this authority to the Secretary of Transportation carries with it the understanding that such transportation services constitute interstate commerce, as the DOT and Secretary of Transportation would otherwise be unable to exercise jurisdiction over those services. Transportation of passengers pursuant to the requirements of the ADA - as in the instant case - is explicitly under the control of the Secretary of Transportation and, therefore, falls within the ambit of the exemptions from overtime payments set forth in Section 13(b)(1) of the Fair Labor Standards Act, 52 Stat. 1067; 29 U.S.C. 213 (b)(1), and the holding of the Third Circuit in our instant case cannot be countenanced.

STATEMENT OF THE CASE

A. Background

PTC provides transportation services to elderly and disabled persons who are unable to use other forms of public transportation through the ACCESS paratransit program as establish by the Port Authority of Allegheny County. The ACCESS paratransit program is designed to meet the needs of the disabled and elderly pursuant to the ADA. The ADA mandates that all common carriers running fixed route service must provide alternative service to the disabled and elderly such that they enjoy the same freedom of movement as the able-bodied. Title II of the

ADA sets forth extensive rules which require public transportation systems to provide transportation to the elderly or infirmed who cannot otherwise use public transportation. The Port Authority of Allegheny County fulfills its ADA obligations via the ACCESS system whereby carriers, including PTC, provide qualified disabled and elderly persons with transportation service pursuant to a contract with ACCESS. ACCESS drivers make prearranged trips to take these disabled and elderly passengers to various destinations within Allegheny County, including portals of interstate commerce.

All of the Plaintiffs in the instant case are PTC ACCESS drivers. Pursuant to the terms of its agreement with ACCESS, PTC provides ACCESS service to and from the Pittsburgh International Airport and to other ports of interstate travel including the Pittsburgh Amtrak train station and the Pittsburgh Greyhound Bus station, as these stations are within PTC's ACCESS service area. ACCESS provides service to approximately 5,000 people with disabilities and 125,000 senior citizens. App. 4a, *Packard v. Pittsburgh Transportation Company*, 418 F.3d at 248. About 75% of disabled ACCESS passengers are certified as "unconditional" users of ACCESS. "Unconditional" use is granted only after a panel of physical and occupational specialists conclude that the disabled passenger is not capable of using public transportation. *Id.*

Passengers must prearrange their ACCESS trips at least 24 hours in advance of travel. Each trip is scheduled for a specific time and at a specific location. App. 4a, *Packard v. Pittsburgh Transportation Company*, 418 F.3d at 249. ACCESS drivers are required to pick up riders no more than 20 minutes after, or 10 minutes before, the scheduled pickup times. ACCESS passengers then present the driver with an appropriately colored voucher, which must be purchased in advance of the scheduled trip. *Id.* As set forth in pages 5-6 of the contract between ACCESS and PTC, the various colors of the voucher correspond to a particular

category of ADA rider eligibility. There is a specific ticket color and category for an out of town visitor who uses ACCESS in Allegheny County.

B. The District Court's Ruling

At the direction of the Court, both parties filed Motions for Summary Judgment and Briefs in Support with Judge Arthur J. Schwab, in the Federal District Court for the Western District of Pennsylvania. PTC argued that, as an interstate common carrier of passengers under an ADA program, the Secretary of Transportation has the power under the MCA to regulate ACCESS drivers' hours and minimum qualifications. It was asserted that because the Secretary of Transportation had the right to control PTC's drivers' hours and qualifications, PTC was exempt from the Fair Labor Standards Act under 29 U.S.C. §213(b)(1). Further, PTC argued that the United States District Court for the Western District of Pennsylvania has already specifically determined that its ACCESS drivers are involved in interstate commerce and are, therefore, exempt from the overtime provisions of the FLSA as per the findings and holding of *Spivak v. Pittsburgh Transportation Co.*, Civ. Act. No. 98-984 (W.D. Pa., May 28, 1999). App. 56a.

In an analysis ultimately rejected by the Third Circuit, the District Court granted Plaintiff's partial Summary Judgment finding that PTC was not entitled to an exemption under the FLSA because its ACCESS service did not have a "through ticketing" arrangement with other interstate carriers and, therefore, was not itself engaged in interstate transportation. App. 35a.

C. The Third Circuit's Decision

The Third Circuit Panel rejected the District Court's "through ticketing" analysis as the decisive criteria for determining if a passenger is traveling in interstate commerce. The Panel independently analyzed the facts and concluded that "through

ticketing is an example of a common arrangement involving both intra and interstate portions of passenger transport, but it is not the only means of establishing that passenger transport operating intrastate is in 'practical continuity with a larger interstate journey.'" App. 21a, *Packard v. Pittsburgh Transportation Company*, 418 F.3d at 258. However, the Panel concluded that, although the District Court's reasoning was flawed, its conclusion was correct because "there is no evidence of any arrangement between PTC and the other carriers," and therefore, no "practical continuity with a larger interstate journey exists." *Id.*

D. Basis for Jurisdiction in District Court

The matter at issue, arising under the laws of the United States, began in the United States District Court for the Western District of Pennsylvania and was properly within the jurisdiction of the District Court pursuant to 28 U.S.C. § 1331.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's Finding that ACCESS Paratransit Drivers are Not Operating in Interstate Commerce Conflicts with the Law of the Fifth Circuit Court of Appeals, Congress' Commerce Power, Prior Third Circuit Precedent, Relevant Decisions of this Court, and the Plain Language of the Motor Carrier Act.

A. The Third Circuit's Decision Conflicts with the Fifth Circuit Court of Appeals.

The Third Circuit's ruling that a common arrangement between the interstate and intrastate carriers is necessary in order to be in "practical continuity with the larger interstate journey" conflicts with the law of the former Fifth Circuit, which has addressed this precise issue and determined that prearrangement of travel plans is sufficient to bring an intrastate travel segment within

the larger interstate journey. In aid of uniformity, this Court should grant certiorari to settle the disagreement between the Circuits.

In *Yellow Cab*, 332 U.S. at 231, this Court held that absent a "special arrangement", an individual's interstate journey begins when one boards the interstate carrier and ends upon the arrival in the city of destination. In consideration of the U.S. Supreme Court's holding in *Yellow Cab*, the Fifth Circuit has held that common arrangements or through ticketing were not essential prerequisites in determining that a passenger was engaged in interstate travel, and that prearrangements are sufficient to satisfy the "special arrangement" criteria to bring a carrier's operations within the stream of interstate commerce. *Charter Limousine v. Dade County Board of Commissioners*, 678 F.2d 586 (Former 5th Cir. 1982).

In the *Charter* case, the Carey Corporation was a business that operated limousine services in various cities. Charter Limousine (hereinafter "Charter") was a franchisee of the Carey Corporation, operating a limousine service solely within the state of Florida. A passenger arriving in Florida via an interstate flight who wished to be picked up by a limousine, would make a prearranged reservation with the Carey Corporation, who would then arrange for Charter to pickup the passenger. *Id.* at 587. Substantially all of Charter limousine's service was prearranged before flight arrival and pickup, and the service maintained no "call and demand" or random pickup of passengers at the airport. Sixty to sixty-five percent of Charter's business was derived from reservations provided through Carey, and twenty to twenty-five percent originated through travel agents. *Id.* The majority of passengers were transported by means of vouchers which the passengers received in advance of travel and handed to the Charter drivers at the time of service. *Id.* Charter had no through ticketing, common arrangement, or interaction of any kind with the interstate carrier.

Notably, both the Third Circuit and the former Fifth Circuit cite the same case, *Southerland v. St. Croix Taxicab Association*, 315 F.2d 364 (3d Cir. 1963), to support opposite conclusions. The Third Circuit erroneously cites to *Southerland* in our instant case to support the proposition that there must be a common arrangement between the intrastate and interstate carriers in order for travel to be considered to be in interstate commerce:

> This lack of coordination with other transportation distinguishes PTC's ACCESS service not only from the *Yellow Cab* taxi shuttles, but also from airport shuttle arrangements that this court found in *Southerland*...to be part of passengers' interstate travel. App. 20a, 418 F.3d at 258.

On the other hand, *Southerland* was cited by the Fifth Circuit to support its holding that the prearranged nature of Charter transportation, satisfied the "special arrangement" criteria stated in *Yellow Cab. Charter Limousine*, 678 F.2d at 588-89. The Fifth Circuit quoted *Southerland* to support its proposition that intrastate transportation arranged for and paid in advance becomes an integral part of the larger intrastate journey:

> This is not a situation where the transportation from the airport to the hotel was local haulage in the sense that the travelers' interstate journey had ended at the airport at which point he could independently contract for his transportation service to his hotel by a conveyance of his own choice. On the contrary, the transportation of these individuals had been arranged for them and paid for in advance as an integral part of their all expense interstate journey.

Id. at 589(quoting *Southerland*, 315 F.2d at 368).

The Fifth Circuit noted that, "The Supreme Court in the *Yellow Cab* case was not laying down ironclad rules which required common arrangements or through ticketing," concluding that "Charter's prearrangements place their operations within the stream of interstate commerce, even though they take place wholly within a single state."[2] *Id* at 587-89.

As first articulated by this Court in *Yellow Cab* and later confirmed by the Fifth Circuit in *Charter*, the "special arrangement" criteria is that which provides the necessary bond, merging the intrastate part of travel to become a constituent part of the interstate movement. Prearranged intrastate transportation in conjunction with the interstate portion of travel, unifies the movement by taking away the freedom a traveler would have absent such an arrangement, thereby guaranteeing that the passenger is going to go from the interstate carrier directly to a designated intrastate carrier.

In the instant case, the prearranged voucher system of ACCESS guarantees that the disabled passenger is going to go from the interstate carrier directly to ACCESS or from ACCESS to the interstate carrier. Therefore, from the standpoint of time and continuity, even the simplest prearrangement prohibits the separation of the intrastate portion of travel from the greater interstate journey. Because of the prearranged nature of the ACCESS transportation voucher system, an ACCESS trip to an interstate hub is not "just another local fare," but rather, it is a prearranged intrastate segment of the larger interstate journey.

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[2] The 5th Circuit rejected an ICC interpretation of interstate commerce which was based on the proposition that *Yellow Cab* required through tickets or common arrangement to be engaged in interstate commerce. It noted that *Yellow Cab* was a Sherman Antitrust case where the issue was whether Yellow Cabs were within the stream of interstate commerce for purposes of the Sherman Act. *Charter Limo* at 588.

The Third Circuit and the former Fifth Circuit each cite the *Southerland* case to support opposite interpretations of this Court's holding in *Yellow Cab.* Certiorari is appropriate to resolve this conflict.

B. The Third Circuit, In Effect, Holds that Congress Does Not Have the Power Under the Commerce Clause to Grant the Department of Transportation the Authority to Promulgate Regulations to Implement the Americans With Disability Act.

The Third Circuit's conclusion that ACCESS drivers are not subject to the jurisdiction of the Secretary of Transportation for purposes of wage and hour issues is inconsistent with Congress' direction that transportation issues relating to the ADA fall under the jurisdiction of the Department of Transportation.[3]

Article I, § 8, Clause 3, of the United States Constitution empowers Congress to regulate Commerce among the several States. In *Gibbons v. Ogden*, 22 U.S. 1 (1824), Chief Justice Marshall defined commerce as "every species of commercial intercourse...which concerns more states than one." Further, Congress' commerce power

> "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make the regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate

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[3] Title II of the ADA covers discrimination in the provision of public services. See (ADA), 42 U.S.C. §§ 12101-12213 (1997), 42 U.S.C. § 12131, et. seq. Title II is divided into two parts: part A covers public services generally, 42 U.S.C. § 12131, et. seq.; part B applies specifically and only to public transportation provided by public entities, 42 U.S.C. § 12141, et. seq. The Department of Transportation regulations implementing the Americans with Disabilities Act of 1990 found at 49 C.F.R. §§ 37.5(a), 37.5(e), 37.169, and 37.173.

> interstate commerce. ...Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power."

Wickard v. Filburn, 317 U.S. 111; 63 S. Ct. 82; 87 L. Ed. 122, 124 (1942).

As evidenced by the contract between ACCESS and PTC, the paratransit program in Allegheny County is designed to meet the needs of the disabled pursuant to the ADA. The ADA mandates that all common carriers running fixed route service must provide alternative service to the disabled such that they enjoy the same freedom of movement as the able-bodied.[4] Title II of the ADA sets forth extensive rules which require accessibility in public transportation systems. The Port Authority of Allegheny County fulfills its ADA obligations via the ACCESS program. Congress has assigned jurisdiction over Title II of the ADA to the

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[4] Section 223 of the ADA of 1990, 42 U.S.C. 12143. Para transit as a complement to fixed route service

(a) General rule. It shall be considered discrimination for purposes of section 202 of this Act [42 USCS § 12132] and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a public entity which operates a fixed route system (other than a system which provides solely commuter bus service) to fail to provide with respect to the operations of its fixed route system, in accordance with this section, Para transit and other special transportation services to individuals with disabilities, including individuals who use wheelchairs, that are sufficient to provide to such individuals a level of service (1) which is comparable to the level of designated public transportation services provided to individuals without disabilities using such system; or (2) in the case of response time, which is comparable, to the extent practicable, to the level of designated public transportation services provided to individuals without disabilities using such system.

(b) Issuance of regulations. Not later than 1 year after the effective date of this subsection [effective July 26, 1990], the Secretary shall issue final regulations to carry out this section.

DOT, a department whose jurisdiction is limited to the regulation of interstate commerce.

Congress' grant of authority to the DOT to promulgate regulations in accordance with the ADA, is done through its commerce power. It is solely through the execution of this granted power that the ACCESS Paratransit program was formed. Thus, PTC and other paratransit companies operating under the ADA are clearly subject to the DOT's jurisdiction and regulation. Any interference with Congress' right to delegate to the DOT the authority to promulgate regulations, including regulations under the ADA, would be an interference with Congress' power to regulate commerce. Therefore, ACCESS Paratransit is operating within interstate commerce, as an "appropriate means" to attain the legitimate end of Congress' effective regulation of interstate commerce. To hold otherwise, no matter the analysis, would be a per se interference or obstruction with Congress' exercise of its Commerce Power under the Constitution.

The Third Circuit's finding that ACCESS drivers are not operating in interstate commerce has the effect of neutralizing the Congressional authority to exercise its Commerce Clause powers in granting ADA jurisdiction to the DOT with respect to paratransit service. To the extent that Title II of the ADA is dependent on the Commerce Clause for constitutional validity, the Third Circuit has nullified that validity with respect to courts in this Circuit.[5]

C. The Third Circuit's Decision Conflicts with Relevant Decisions of This Court and Prior Third Circuit Precedent.

The Third Circuit erred in concluding that this Court's holding in *Yellow Cab*, 332 U.S. 218, compelled the finding that

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[5] The Panel's decision is the first that suggests that, with respect to transportation issues, the Commerce Clause does not authorize the ADA.

prearranged transportation of elderly and disabled ACCESS passengers to ports of interstate travel is not a part of interstate movement.

In *Yellow Cab*, this Court considered the interstate nature and character of two types of taxi service, both involving transportation of passengers immediately before or after an interstate railroad trip. The first type of service, provided under contract with the railroad, involved carrying passengers between two railroad stations in order for them to immediately continue their interstate travels. This Court found that the taxis providing this service were "clearly part of the stream of interstate commerce." *Id.* at 228. The second type of taxi service involved carrying passengers from the railroad stations to their homes, offices or hotels. This Court found that these taxis were not engaged in interstate commerce. *Id.* at 230.

The Third Circuit misinterprets this Court's decision by concluding that the ACCESS service provided by PTC is akin to the non-interstate Yellow Cab taxi service. In *Yellow* Cab, this Court's reasoning with respect to why the second taxi scenario fell outside the stream of interstate commerce was succinctly stated as follows:

> What happens prior to or subsequent to that rail journey, at least in the absence of some special arrangement, is not a constituent part of the interstate movement. The traveler has complete freedom to arrive at or leave the station by taxicab, trolley, bus, subway, elevated train, private automobile, his two legs, or various other means of conveyance. From the standpoint of time and continuity, the taxicab trip may be quite distinct from the interstate journey.

Yellow Cab, 332 U.S. at 232.

Despite recognizing the parameters of the ACCESS program in its factual recitation, the Circuit Court fundamentally misapprehends the nature of ACCESS transportation. Unlike the taxi passengers in the non-interstate scenario of the *Yellow Cab* case, ACCESS passengers do not have the freedom to choose from the varieties of transportation detailed by the Supreme Court in *Yellow Cab*. ACCESS exists to serve passengers under the ADA who cannot use standard public transportation. If the ACCESS riders had the capability of using other means of transportation, they would not be eligible for the ACCESS service.

Further, once their trip is arranged and scheduled, ACCESS passengers have limited, if any, control over changing the timing of their trip. They must proceed at the pre-arranged time and place. There is no "call and demand" ACCESS service. The freedom of travel recognized by the Court in *Yellow Cab* would include the ability to break indefinitely from the rigors of travel and take a meal, sit and rest, peruse a gift shop or engage in any other distraction which caught the traveler's fancy. ACCESS passengers enjoy no such spontaneity. ACCESS tickets must be purchased in advance and transportation must be scheduled 24 hours in advance. An ACCESS driver is scheduled to meet the passenger at the terminal at a specified place and an arranged time to provide continuing transportation service to the passenger. Thus, when an ACCESS passenger exits the bus, train or plane, there is no option to engage in other activities - the ACCESS passenger is obligated to meet his ACCESS ride at the prearranged time and place in continuance of the interstate journey.

The Third Circuit's ruling in *Southerland v. St. Croix*, 315 F.2d 364, has also been interpreted by other Circuits to compel the opposite conclusion reached by the Third Circuit in our instant case. In *Southerland*, the travelers were provided an all-expense paid trip by their employer as a bonus. Contrary to the Third Circuit's reading of the case, the interstate air carrier and the taxi company that took travelers from the airport to their hotels were

wholly separate entities with no contractual relationship between them. The travelers had separate airline tickets and ground transportation coupons. The only connection between the airline and the local transportation company was that both had been prearranged and prepaid by the travel company marketing the vacations.

In the instant case, the ACCESS passenger pre-arranges for both the air, train and/or bus service, as well as ACCESS service. Thus, the only difference between *Southerland* and the present case is that in *Southerland*, the travel was prearranged and prepaid by a third party.

The Third Circuit suggests that the fact that a trip was arranged by a third party is of great importance, stating that "unlike in *Southerland*, the ACCESS drivers' services are not arranged as part of their passengers' interstate travels through a prepackaged tour, or linked in any other way." App. 21a, 418 F.3d at 258. In like fashion, the Third Circuit concluded that the MCA exemption is inapplicable because "there is no evidence of any arrangement between PTC and the other carriers." *Id.*

The Third Circuit's analysis inexplicably ignores the fact that in *Southerland*, as in this case, there was no arrangement of any kind between the local transport and the air carrier and, therefore, the lack of an arrangement between PTC and other carriers cannot stand as justification for the Circuit Court's decision. This is the exact interpretation the Fifth Circuit gave to *Southerland* in finding that prearranged travel - no matter who schedules that travel - qualifies as part of the greater interstate journey.

The Third Circuit's other grounds for distinguishing *Southerland* from the instant case - a third party's pre-booking of a one-price travel package - is also logically impossible to accept. The Third Circuit's findings would facilitate a situation where two

passengers can book the exact same interstate trip covering the exact same route; making the exact same connections; with the exact same carriers, for all segments of transportation – one using a travel agent and one booking the trip himself - and, under the Third Circuit's logic, the "travel agent" passenger is traveling in the stream of interstate commerce while the self-booking passenger is not.

Compounding its error, the Third Circuit gave no weight to the fact that, in practice, due to their disabilities, ACCESS passengers have less freedom than the passengers in *Southerland* - who could have refused the benefit of the prepaid bus or taxi trip and arranged their own alternative transportation to the hotel. In contrast, ACCESS passengers do not have the freedom to arrive or leave the airport, bus or train station by transportation other than ACCESS.

D. The Third Circuit's Decision Ignored the Plain Language of the Motor Carrier Act and Department of Transportation Regulations.

The Third Circuit's holding is not only in conflict with authority from other Circuits, but it is also contrary to the plain language of § 13501 of the Motor Carrier Act. Statutes are to be interpreted according "to the plain meaning of the words." *Browder v. United States*, 312 U.S. 335, 338 (1941). *Rubin v. United States*, 449 U.S. 424, 430 (1981) (absent "rare and exceptional circumstances," there exists no need to go beyond the words of the statute).

The MCA, 49 U.S.C.13501, supra at 4, provides that the Secretary of Transportation and the Surface Transportation Board have jurisdiction over transportation by motor carrier to the extent that passengers are being transported by motor carrier "on a public highway." There is no dispute that PTC is a motor carrier of passengers which operates its ACCESS vehicles on public

highways, and there should be, likewise, no dispute that the DOT has jurisdiction over PTC's ACCESS drivers as that is "the unambiguously expressed intent of Congress."

Further, the DOT defines interstate commerce as "trade, traffic, or transportation…between two places in a State as part of trade, traffic, or transportation originating or terminating outside the State or the United States." 49 C.F.R. § 390.5. Clearly, the DOT regulations unambiguously subject ACCESS drivers to the Secretary's authority.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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February 10, 2006

APPENDIX A
COURT OF APPEALS OPINION

PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 03-3088

CAROL PACKARD, JAMES SINCLAIR, HOWARD BOOKER, FLORENCE MARIE CAMP, EMANUEL A. BRATTEN, RONALD E. DOMINICI, CHARLES R. ROTHERT, SR., RAYMOND DAVIS, DONALD S. SPADE, BEVERLY J. BENNETT, RANDER J. THOMPSON, DARRYL SIGEL, LA VERA RAWLINGS, LEROY F. WISE, DAVID L. MORRIS, EDWARD R. CROSBY, GERALDINE REINHEIMER, PATRICIA ZILCH, SHANNON MCGRATH, DARRYL TURNER, and NORBERT G. ABEL, Plaintiffs-Appellees

v.

PITTSBURGH TRANSPORTATION CO.,
Defendant-Appellant

On Appeal from the U.S. District Court for the Western District of Pennsylvania (D.C. Civil No. 02-89) District Judge: The Honorable Arthur 1. Schwab

Argued December 15, 2004

Before: **NYGAARD and GARTH, Circuit Judges, and POLLAK, District Judge.

(Opinion Filed: August 12, 2005)

OPINION OF THE COURT

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*Honorable Louis H. Pollak, Senior District Judge for the United States District Court of the Eastern District of Pennsylvania, sitting by designation.
**Honorable Richard L. Nygaard assumed senior status on July 9, 2005

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POLLAK, District Judge:

In this appeal, appellant-defendant Pittsburgh Transportation Co. ("PTC") seeks to establish that drivers for its ACCESS transit service ("ACCESS drivers"), including plaintiffs-appellees, are not eligible for overtime under the Fair Labor Standards Act ("FLSA"). The precise question before us is whether the ACCESS drivers, who would ordinarily be eligible for overtime, become ineligible by virtue of a provision of the Motor Carrier Act ("MCA") that vests authority in the Secretary of Transportation to regulate certain aspects of interstate transport. Those within the Secretary's sphere of authority under the MCA are excluded from the overtime provisions of the FLSA. The District Court concluded that this so-called "MCA exemption" from the FLSA was not applicable here, and that the ACCESS drivers therefore remained eligible for overtime pay. We agree with that conclusion, although we reach it by a different route, and will affirm the judgment of the District Court.

I.

PTC's ACCESS service, not available to the general public, provides transportation to elderly and disabled persons who are unable to use other forms of public transportation. Under a contract with ACCESS Transportation Systems, Inc., a federally-funded program to provide such services, PTC's ACCESS program

serves roughly 5,000 people with disabilities and 125,000 seniors. Most of these passengers have "unconditional" eligibility, which requires a certification of need based on review by a special panel, while others are eligible based on certain more temporary conditions.

PTC provides ACCESS service within a defined service area in Allegheny County that includes the Pittsburgh Amtrak and Greyhound stations. PTC also provides some ACCESS service to and from the Pittsburgh International Airport, which is outside its regular service area. PTC's ACCESS service operates entirely within Pennsylvania, and ACCESS drivers do not transport passengers across state lines. It is unclear what portion of ACCESS service involves train or bus terminals. Trips to the airport are a very minor part of ACCESS's aggregate operations, [2] but it is the case that most, if not all, of the ACCESS drivers have made at least a few trips to the airport. Because PTC assigns the airport trips indiscriminately along with other trips, any ACCESS driver may be called upon to drive such trips.

Unlike conventional bus systems, PTC's ACCESS service does not have regular, set routes, or set stops or schedules from day to day. Rather, PTC schedules passengers' trips each day to provide the most efficient service possible. To use the service, eligible passengers must schedule their trips at least one day in advance, by telephoning schedulers at either PTC or ACCESS. Although limited same-day trips may also be scheduled when space is available, ACCESS drivers do not pick up or drop off passengers except as scheduled in advance through the central schedulers. A passenger purchases a ticket for the service in advance, presenting the ticket to the ACCESS driver as payment. Tickets for ACCESS service are not linked in any way to tickets for interstate travel, or indeed intrastate travel, on non-ACCESS transit services.

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[2] During 2001 and 2002, airport trips were almost always made by a separate ACCESS provider, Airbus, but the ACCESS drivers still made such trips occasionally.

Because PTC contends that its ACCESS drivers are excluded from the FLSA's overtime protection, it has refused to pay the drivers more than their ordinary hourly wage when they work more than 40 hours per week. It is undisputed that the drivers regularly work over 40 hours per week, and that they are entitled to recover overtime compensation for the excess hours if they are not subject to the FLSA's MCA exemption.

After the ACCESS drivers filed this action in the United States District Court for the Western District of Pennsylvania, seeking to confirm their entitlement to FLSA overtime pay, both parties filed motions for partial summary judgment on the question of the drivers' entitlement to overtime protection.

The District Court denied PTC's motion, and granted the ACCESS drivers' motion in part. The District Court ruled that the ACCESS drivers were not excluded from the protections of the FLSA, and remained entitled to overtime, because they were not within the Secretary of Transportation's authority to regulate interstate transport. According to the District Court, the ACCESS drivers were not engaged in interstate transport because the ACCESS service (which does not physically provide transport outside of Pennsylvania) does not involve "through ticketing" arrangements with interstate transport.

The court then entered final judgment for the ACCESS drivers, based on the parties' stipulation as to the amount of compensatory damages and the court's determination of appropriate liquidated damages and attorneys' fees. PTC timely filed this appeal, challenging the underlying liability determination.

The issues presented here have also been raised, but not decided, in three actions in the Western District of Pennsylvania involving ACCESS drivers for PTC and for another transportation company in the Pittsburgh area, Laidlaw Transportation, Inc. ("Laidlaw"). One of these actions, *Eugene J. Kott, et al. v. Pittsburgh Transportation Co.*, No. 02-0089, has been dismissed without prejudice pending the resolution of this appeal. In *Spivak v. Pittsburgh Transportation Co.*, No. 98-984 (W.D. Pa. May 28,

1999), the District Court found that PTC could apply the MCA exemption to plaintiff Machall Spivak, an ACCESS driver. However, because Spivak did not dispute that he was engaged in interstate transportation while making airport trips, the *Spivak* decision does not directly address the issues presented here. In the third action, *Greenwood v. Laidlaw Transit Services, Inc.*, No. 01-0728, the District Court has denied both parties' motions for summary judgment. Laidlaw has submitted an amicus brief supporting PTC's position on this appeal.

II.

Our review of the District Court's grant of partial summary judgment is plenary. *Madison v. Res. for Human Dev., Inc.*, 233 F.3d 175, 180 (3d Cir. 2000).

III.

Appellant PTC seeks reversal of the District Court's grant of partial summary judgment to its ACCESS drivers, as to liability on the drivers' claims for overtime pay under Section 7 of the Fair Labor Standards Act ("FLSA"), 29 V.S.C. § 207(a)(I). PTC claims that the drivers are exempt from the FLSA's overtime requirements under the Motor Carrier Act ("MCA") exemption, set forth at 29 V.S.C. § 213(b)(1). It is well settled that exemptions from the FLSA are construed narrowly, against the employer. *Madison*, 233 F.3d at 183. Accordingly, PTC bears the burden of proving "plainly and unmistakably" that the drivers qualify for the MCA exemption. *See Friedrich v. US. Computer Servs.*, 974 F.2d 409, 412 (3d Cir. 1992).

A. The Statutes

Section 7 of the FLSA requires employers to pay overtime compensation to employees who work more than forty hours per week, unless one or another of certain exemptions applies. 29

V.S.C. § 207. The exemption said by PTC to be applicable here, the MCA exemption, appears in Section 13(b)(I) of the FLSA, and provides that overtime pay is not required for "any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of Title 49." 29 V.S.C. § 213(b)(1).

Section 31502 of Title 49 "applies to transportation... described in sections 13501 and 13502 of [Title 49]." 49 V.S.C. § 31502. In turn, Section 13501 of Title 49 provides in relevant part that the Secretary and the Surface Transportation Board have jurisdiction "over transportation by motor carrier. . . to the extent that passengers, property, or both, are transported by motor carrier between a place in . . . a State and a place in another State." 49 U.S.C. § 13501.[3] Our task is to determine whether the ACCESS drivers' work brings them within the scope of this statutory authority.

1. The District Court's Ruling

The District Court found that the ACCESS drivers were not within the authority of the Secretary of Transportation. The District Court determined that, in general, the Secretary's authority extends

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[3] The complete text of Section 13501 reads as follows:
The Secretary [of Transportation] and the [Surface Transportation] Board have jurisdiction, as specified in this part, over transportation by motor carrier and the procurement of that transportation, to the extent that passengers, property, or both, are transported by motor carrier-(1) between a place in-(A) a State and a place in another State;
(B) a State and another place in the same State through another State;
(C) the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States;
(D) the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or (E) the United States and a place in a foreign country to the extent the transportation is in the United States; and
(2) in a reservation under the exclusive jurisdiction of the United States or on a public highway.

to transportation in which there is "practical continuity of movement" across state lines. In applying this concept to the ACCESS drivers' situation, though, the District Court adopted a particular, narrow interpretation of that term.

The District Court found that "[t]he DOL [Department of Labor], in consultation with the DOT [Department of Transportation], addressed the issue of 'practical continuity of movement' as applied to intrastate bus drivers in a 1999 opinion letter, which adopted the reasoning of a 1974 DOT ruling. In the letter, John R. Fraser, Acting Administrator of the Wage and Hour Division, V.S. Department of Labor, asserts that intrastate bus drivers would always be eligible for FLSA overtime compensation, except in one situation not applicable here." The District Court then quoted the following passage from the Fraser letter:

> Section 204 [the predecessor to 49 V.S.C. § 31502][4] does not apply merely because the operation makes stops at airports, railroad stations or bus depots and picks up passengers who have had or will have a prior or subsequent interstate journey. The only case in which section 204 would apply to a local bus operation transporting passengers who have made or will make a prior or subsequent journey across a State line is one in which there is a through ticketing arrangement under which the passengers purchase a single ticket which is good for both the local bus ride and the subsequent interstate journey.

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[4] Section 204 of the MCA, like the current 49 V.S.C. § 31502, defined the range of transportation activities subject to DOT authority and therefore not protected by the FLSA.

After acknowledging that "the DOT, not the DOL, has the authority to interpret the DOT's power under the MCA,"[5] the District Court went on to find that "the DOL's interpretation must be given deference because the DOL and the DOT agree on the interpretation." Because there is admittedly no "through ticketing arrangement" covering ACCESS passengers who also travel interstate, the District Court found that the MCA exemption did not apply, and that the ACCESS drivers remained eligible for overtime pay.

In appealing the District Court's ruling, PTC challenges the "through ticketing" test. To assess the "through ticketing" test, we will examine the sources on which the District Court relied. First, looking back to 1974, it appears that what the District Court referred to as "a 1974 DOT ruling" whose "reasoning" was "adopted" by the DOL was in fact an unofficial interagency letter. On July 8, 1974, one Isaac Benkin, then Assistant Chief Counsel for Motor Carrier and Highway Safety Law at the DOT, wrote a letter (the "Benkin letter") to the DOL's Division of Minimum Wage and Hour Standards, purporting to answer several questions from the DOL about the scope of the DOT's authority. One of the questions was the following:

> Does section 204 of the Motor Carrier Act [which then defined the aspects of the Secretary of Transportation's authority relevant here] apply to privately operated transit systems utilizing motorbuses operating over fixed routes which may cross State lines or have stops or terminals at airports, railroad stations, or interstate bus depots?

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[5] The DOL has no independent authority to interpret the MCA, even though the MCA defines the scope of an FLSA exemption, because the DOL is not the agency entrusted with the administration of the MCA. See *Friedrich v. U.S. Computer Servs.*, 974 F.2d 409,411 n.3 (3d Cir. 1992).

Mr. Benkin's answer to this question, in its entirety, read as follows:

> Section 204 applies if the bus operations are conducted across a State line. Section 204 does not apply merely because the operator makes stops at airports, railroad stations or bus depots and picks up passengers who have had or will have a prior or subsequent interstate journey. The only case in which section 204 would apply to a local bus operation transporting passengers who have made or will make a prior or subsequent journey across a State line is one in which there is a through ticketing arrangement under which the passengers purchase a single ticket which is good for both the local bus ride and the prior or subsequent interstate journey by air, rail, or bus.

Mistakenly referring to the Benkin letter as a "ruling by the U.S. Department of Transportation (DOT)," Mr. Fraser of the DOL relied on it twenty- five years later in two 1999 opinion letters stating that certain categories of drivers apparently akin to the appellees in the case at bar were not within the MCA exemption, and were therefore subject to the FLSA's overtime requirements. The District Court, in turn, relied on one of these DOL letters because the District Court found that the DOT shared the DOL's interpretation. However, neither the 1974 Benkin letter nor the 1999 Fraser letter the District Court relied on has the formality and weight that would merit judicial deference.[6]

Some agency interpretations of statutes the agency administers are entitled to substantial judicial deference. Here, the ACCESS drivers contend that Mr. Benkin's endorsement of a

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[6] One of the DOL letters also stated that the DOL had "confirmed with DOT that this ruling ha[d] not since been superceded." This undocumented recital cannot be entitled to deference as an official DOT interpretation.

"through ticketing" test is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which requires judicial deference to an agency's reasonable interpretation of an ambiguous statute entrusted to its administration. However, "[i]nterpretations such as those in opinion letters - like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law - do not warrant Chevron-style deference." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). The informal and cursory Benkin letter falls into this category, and hence does not merit *Chevron* deference. The Fraser letter would similarly lack authority, even if the DOL had authority to interpret the MCA, which it does not. As this court has said, "[t]o grant *Chevron* deference to informal agency interpretations would unduly validate the results of an informal process." *Madison*, 233 F.3d at 186.

In the absence of *Chevron* deference, the ACCESS drivers contend that the Benkin letter is at least entitled to the lesser degree of deference called for by Skidmore v. Swift, 323 U.S. 134 (1944). However, Skidmore deference is available only based on an agency interpretation's power to persuade. The general rule, where Chevron deference is not warranted, is that "[t]he weight of [an agency's] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade if lacking power to control." *Skidmore*, 323 U.S. at 140. The materials at issue here simply provide no reasoning or analysis that a court could properly find persuasive.

Accordingly, we are of the view that the "through ticketing" test utilized by the District Court is not a legal standard that suffices to determine whether the MCA exemption is applicable to the ACCESS drivers. We turn, then, to other sources of guidance.

B. Analysis

Setting aside the "through ticketing" test, we will inquire whether guidance is forthcoming from (a) DOT regulations, or lack thereof, or (b) case law addressing analogous questions.

1. Regulatory Framework

PTC maintains that a definition of interstate commerce in DOT regulations unambiguously subjects the ACCESS drivers to the Secretary's authority. The DOT has defined interstate commerce as "trade, traffic, or transportation . . . between two places in a State as part of trade, traffic, or transportation originating or terminating outside the State or the United States." 49 C.F.R. § 390.5 (emphasis added). However, even if this definition of "interstate commerce" may be used as a form of shorthand for the MCA's specific language (in 49 D.S.C. § 13501),[7] the DOT's regulation is not dispositive one way or another, since it provides no instruction as to what activity is "part of" interstate commerce in marginal situations such as that presented here.[8]

The ACCESS drivers contend that they are not within the MCA exemption because the Secretary of Transportation has never in fact regulated their work. However, the MCA exemption depends only on the existence of secretarial authority, not on its exercise. *Levinson v. Spector Motor Serv.*, 330 U.S. 649,678 (1946); *Morris v. McComb*, 332 U.S. 422, 434 (1947); *Friedrich*,

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[7] See text at note 3, supra.

[8] PTC and Laidlaw also refer us to DOL regulations defining the sphere of interstate commerce that is subject to the FLSA. These regulations could be, at best, persuasive. See supra note 5. However, the regulations themselves note that the MCA's definition of interstate commerce is "not identical with the definitions in the [FLSA]," 29 C.F.R. § 782.7(a), and has been more narrowly interpreted by the courts than the parallel definition in the FLSA, 29 C.F.R. § 782.7(b)(I). Thus, they do not help us here.

974 F.2d at 416. Thus, it does not matter that the ACCESS drivers' vehicles are below the weight threshold above which the Secretary's safety regulations apply, as the District Court found that they are, or whether the drivers are exempt from the Secretary's regulations for any other reason. See id.; *Martin v. Coyne Int'l Enter., Corp.*, 966 F.2d 61 (2d Cir. 1992) (finding laundry truck drivers excluded from FLSA protection although trucks weighed 10,000 pounds and therefore were exempt from Highway Administration's safety regulations).

2. Judicial Treatment of the MCA Exemption

In the one MCA exemption case addressed by this court, the operative facts were far afield from those in the case at bar. In *Friedrich v. U.S. Computer Services*, 974 F.2d 409 (3d Cir. 1992), the employees contending that they were entitled to overtime pay were technicians providing installation, maintenance and repair services for cable television firms. In carrying out their responsibilities, the technicians, headquartered in Pennsylvania, drove with their equipment and tools to customers located in Pennsylvania and in all the states bordering on Pennsylvania. Although the technicians generally drove their own vehicles, which weighed less than the "commercial vehicles" of over 10,000 pounds that the DOT had affirmatively undertaken to regulate, we concluded that the DOT's non-exercise of its regulatory power did not undercut that power.

> Because the plaintiffs literally fell within the MCA exemption and neither Congress nor the DOT has taken action to the contrary, we hold that employees operating passenger automobiles in interstate activities which require them to transport property essential to their job duties come within the reach of the Federal Motor Carrier Act as amended and are therefore exempt from the FLSA' s overtime compensation requirements.

Id. at 419.

Thus, in *Friedrich*, unlike the case at bar, the employees were in fact driving interstate and doing so as a regular and central dimension of their jobs. Moreover, their duties required them to transport property as well as themselves.

In turning to decisions in other courts, it appears that, as a general matter, cases sustaining claims of MCA exemption from the FLSA overtime requirements involve patterns of distribution markedly unlike the ACCESS pattern. Typically, the carrier's activity is a clearly identifiable element of an integrated interstate distribution system. Also, typically, the items the carrier is transporting are not passengers but freight.

Back in 1947, in *Morris v. McComb*, 332 U.S. 422 (1947), a sharply divided Supreme Court held that truck drivers and mechanics employed by a Detroit carrier engaged in the transport of steel came within the MCA exemption. Four percent of the transport was "directly in interstate commerce", id. at 427; the balance was (a) steel transported "largely within steel plants. . . for further processing. . . an unsegregated potion of [which] was shipped ultimately in interstate commerce," and (b) steel transported "between steel mills and industrial establishments . . . [and] used in connection with the manufacture of automobiles, a substantial portion of which entered interstate commerce." Id. In referring to the 4% of the carrier's operations which (unlike the operations of ACCESS) were "directly in interstate commerce," the Court noted that the carrier, in order fully to serve its shippers, had "a practical situation such as may confront any common carrier engaged in a general cartage business, and who is prepared and offering to serve the normal transportation demands of the shipping public in an industrial metropolitan center." Id. at 434.

More recent instances in which claims of MCA exemption have been sustained are not dissimilar. For example, in *Bilyou v.*

Dutchess Beer Distributors, Inc., 300 F.3d 217 (2d Cir. 2002), the Second Circuit found no FLSA protection for an intrastate driver who drove empty beer bottles to a facility from which they were later shipped out of state. However, the *Bilyou* driver's activities were part of a clearly integrated commercial cycle: the beer distributor received full bottles from out-of-state suppliers and distributed them to customers, the plaintiff driver picked up the empties and returned them to the distributor (though technically employed by a different company), and the distributor shipped them out of state and received credit for the returns. Id. at 220. Other cases like *Bilyou* similarly involve an integrated system of interstate shipments. See, e.g., *Klitzke v. Steiner Corp.*, 110 F.3d 1465, 1470 (9th Cir. 1997) (involving local delivery driver for linen service that ordered roughly half of the materials it supplied from out-of-state suppliers, based on specific customers' orders); *Foxworthy v. HilandDairy Co.*, 997 F.2d 670, 672 (10th Cir. 1993) (involving Oklahoma truck driver who regularly delivered dairy products ordered from his employer's Arkansas plant to customers in Oklahoma); *Beggs v. Kroger Co.*, 167 F.2d 700 (8th Cir. 1948) (involving truck drivers who regularly delivered merchandise - 89% of it from outside the state - to their employer's retail groceries from its warehouse, and who returned empty bottles and unsold merchandise to the warehouse for shipment out of state).

There is no general rule that once something (either passenger or freight) embarks on a journey that will eventually carry it between two states, every moment of that journey, through the last conceivable moment of travel, is necessarily interstate transport under the MCA. Although a mere shift from one carrier to another does not disrupt an otherwise-integrated interstate trip, *see The Daniel Ball*, 77 U.S. 557 (1871) (considering the limits of the powers of Congress), the Supreme Court has recognized that this does not mean that all portions of a trip including some interstate travel are necessarily integrated.

As Justice Brandeis remarked in Baltimore & Ohio *Southwestern Railroad Co. v. Settle*, 260 U.S. 166 (1922), whether a particular portion of travel is interstate or intrastate "depends on the essential character of the movement." Id. at 170 (rejecting an interstate shipper's attempt to pay lower total tariffs by shipping its goods first from one state into another, and then, after taking possession of them, re-shipping them to their ultimate destination in the latter state). The Court made clear in that case that the "essential character" of movement that determines incorporation into interstate transport depends on the individual facts of each case, and that mere proximity in time and space will not necessarily make an intrastate trip part of a larger interstate voyage. Id. at 173. Rather, the "essential character" of truly interstate transport will show some "essential continuity of movement." Id. (emphasis added).

When we apply the "essential character of the movement" inquiry to the ACCESS drivers, it is clear that other cases applying the MCA exemption do not suggest the proper outcome here. The ACCESS drivers are not integrated into their passengers' interstate travel to the degree in which many intrastate commercial drivers are integrated into the interstate movement of commercial goods. Indeed, the ACCESS service lacks any legal or institutional connection to the interstate movement of passengers or goods. Although the service's pick-up or drop-off point sometimes coincides in time and space with one endpoint of certain passengers' interstate journeys, there is no well established logical or logiistical connection between the two.

The distinction between the "essential character" of the ACCESS drivers' work and that of the commercial freight operations considered in other MCA exemption cases also reflects broader differences in the usual commercial treatment of freight and passenger transportation. The Supreme Court has recognized in another context that "what may fairly be said to be the limits of an interstate shipment of goods and chattels may not necessarily be

the commonly accepted limits of an individual's interstate journey," and that the courts "must accordingly mark the beginning and end of a particular kind of interstate commerce by its own practical considerations." *United States v. Yellow Cab Co.*, 332 U.S. 218, 231 (1947). In any event, unlike the delivery drivers in the cases canvassed above, the ACCESS drivers are not part of a clearly-defined, routine interstate commercial exchange controlled centrally by their employer.

Because the cases considering the FLSA status of commercial freight drivers are factually unlike that presented here, we will look outside the array of cases applying the MCA exemption to consider past judicial treatment, in other statutory contexts, of passenger transportation more similar to the ACCESS service.

3. Interstate Transportation in Other Contexts

In the 1940s the Supreme Court twice addressed the question whether Capital Transit, a company that provided public transit almost entirely within the District of Columbia, was subject to the regulatory authority of the ICC. The Court's approach, in upholding the ICC's authority, focused heavily on the massive interstate movement of Capital Transit's passengers; the facts of the two *Capital Transit* cases offer an instructive counterpoint to the facts of the case at bar. Thousands of Capital Transit's passengers were commuting government employees who rode the company's streetcars or buses within the District to transfer points where they boarded interstate transportation to Virginia. In its first opinion on the matter, *United States v. Capital Transit Co.*, 325 U.S. 357 (1945)("Capital Transit I"), the Court found that Capital Transit was subject to ICC regulation in part because it provided interstate service on one particular route that ran from the District of Columbia into Virginia. However, on a rehearing of the same case after Capital Transit had discontinued its sole interstate route, the Court again found that the ICC had regulatory authority. The

Court stood by its earlier holding that Capital Transit's transportation service - now provided exclusively within the District - was "part of a continuous stream of interstate transportation," and "an integral part of an interstate movement." United States v. Capital Transit Co., 338 U.S. 286, 290 (1949) (per curiam) ("Capital Transit II").

The Supreme Court's analysis in *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947),[9] offers more guidance here than the Capital Transit decisions. Although Yellow Cab involved the Sherman Act, not the MCA, it followed Capital Transit I in looking to the "commonly accepted sense of the transportation concept" to determine what travel was part of an interstate journey.[10] *Yellow Cab*, 332 U.S. at 231. Indeed, *Capital Transit II* later noted that *Yellow Cab* "does not conflict with our prior holding [in *Capital Transit I*] that [Capital] Transit's transportation was part of a continuous stream of interstate transportation." *Capital Transit II*, 338 U.S. at 290. In applying the *Capital Transit I* standard to the *Yellow Cab* facts, which involved taxi service to

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[9] *Yellow Cab* has been limited, but not overruled, on grounds unrelated to the matters discussed here. Specifically, in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), the Court repudiated the intra-enterprise conspiracy doctrine that had been derived from Yellow Cab.

[10] *Yellow Cab* has guided courts considering the boundaries of interstate movement under statutes other than the Sherman Act. See, e.g., *Airlines Transp. v. Tobin*, 198 F.2d 249,251 (4th Cir. 1952) (finding limousine service to and from airport, provided under contract with the airlines, was within interstate commerce as defined under the FLSA); *Mateo v. Auto Rental Co.*, 240 F.2d 831 (9th Cir. 1957) (finding, under the FLSA, that airport drivers in Honolulu were not within interstate commerce where they had no valid contractual arrangements with the airlines). Addressing the scope of the ICC's jurisdiction, the D.C. Circuit referred to *Yellow Cab*, and later FLSA case law based on it, as establishing a general "principle. . . that the degree of contact between the interstate carrier and the local transportation is an important factor [in defining the scope of interstate travel]." *Pa. Pub. Util. Comm'n v. United States*, 812 F.2d 8, 11 (D.C. Cir. 1987) (upholding ICC decision that company providing shuttle service from airport to hotel and back for airline crew was engaged in interstate commerce and not subject to regulation by the state of Maryland).

railroad stations in Chicago, the Court noted that "interstate commerce is an intensely practical concept drawn from the normal and accepted course of business." *Yellow Cab*, 332 U.S. at 231. Therefore, the Court directed courts to "mark the beginning and end of a particular kind of interstate commerce by its own practical considerations." Id.

The Court's application of this approach in Yellow Cab is instructive. The Court considered two types of taxi service, both involving taxi transportation of passengers immediately before or after an interstate railroad trip. The first type of service, provided under contracts with the railroads, involved carrying passengers between two railroad stations, in order for them immediately to continue their interstate travels. The Court found that taxis providing this service were "clearly a part of the stream of interstate commerce." Id. at 228. Viewing the intrastate portion of the journey - the shuttling between railroad stations - "in its relations to the entire journey rather than in isolation," the Court found that it was "an integral step in the interstate movement." Id. at 229.

However, the Court found that taxis providing the second type of taxi service, which merely involved carrying passengers between the railroad stations and their homes, offices, or hotels, were not engaged in interstate commerce. Id. at 230. "To the taxicab driver, [such a trip to the railroad station was] just another local fare." Id. at 232. Those providing the service had "no contractual or other arrangement with the interstate railroads," nor any joint collection or payment of fares. According to the Court, "their relationship to interstate transit [wa]s only casual and incidental." Id. at 231. The Court found, and we agree today, that "[t]he common understanding is that a traveler intending to make an interstate rail journey begins his interstate movement when he boards the train at the station and that his journey ends when he disembarks at the station in the city of destination." Id. at 231. Thus, "[w]hat happens prior or subsequent to that rail journey, at

least in the absence of some special arrangement, is not a constituent part of the interstate movement." Id. at 232.

The second type of Yellow Cab service seems more closely analogous to the ACCESS service than Yellow Cab's shuttling between stations or the mass commuter service found to be part of interstate travel in Capital Transit. ACCESS service to interstate terminals similarly involves no joint fare or ticketing arrangement, and no prior arrangement of any kind, contractual or otherwise, with the railroads, airlines, or other companies that carry a certain few ACCESS passengers across state lines. Also, there is no strong, established cycle of regular passenger movement between the ACCESS service and particular interstate routes. To the ACCESS drivers and their passengers, a trip to an interstate travel hub is "just another local fare."

This lack of coordination with other transportation distinguishes PTC's ACCESS service not only from the *Yellow Cab* taxi shuttles, but also from airport shuttle arrangements that this court found in *Southerland v. St. Croix Taxicab Association*, 315 F .2d 364 (1963), to be part of passengers' interstate travel. In *Southerland*, the local government of the Virgin Islands had made an exclusive arrangement for a local taxi company to provide all transportation from the airport to local hotels. This court found that the preferential arrangement favoring the local taxi company unreasonably burdened interstate commerce because it conflicted with prior arrangements by the plaintiffs tour agency to provide the same service for certain passengers on an interstate package tour. Id. The tour agency's transportation services were found to be part of the passengers' interstate travel, although the agency did not itself provide direct interstate transportation, because the services "had been arranged for [the passengers] and paid for in advance as an integral part of their all-expense interstate journey." Id. at 369. Therefore, this court ruled that "it cannot, under these facts, be said that the service rendered by the plaintiff under his contract was

distinct and separate from the interstate journey or that it was just another local fare." Id. (emphasis added).

Unlike in *Southerland*, the ACCESS drivers' services are not arranged as part of their passengers' interstate travels through a pre-packaged tour, or linked in any other way. Even where certain of ACCESS passengers' travels will eventually carry them out of the state, the ACCESS service itself is purely intrastate.

Accordingly, we conclude that there is no "practical continuity of movement," in connection with the ACCESS drivers' services. Hence, the MCA exemption does not apply. While "through ticketing" is one example of a common arrangement involving both intra and interstate portions of passenger transport, it is not the only means of establishing that passenger transport operating intrastate is in practical continuity with a larger interstate journey. In that sense, the District 40 Court's reasoning missed the mark even though its conclusion was correct. In this case, as we have stated, there is no evidence of any arrangement between PTC and the other carriers, thus rendering the MCA exemption inapplicable to the ACCESS drivers.

IV.

When an employer contends that a sub-set of its employees are excluded from FLSA overtime entitlements by virtue of the MCA exemption, "[i]t is the employer's burden to affirmatively prove that its employees come within the overtime exemption, and any exemption from the Act must be proven plainly and unmistakably." *Friedrich*, 974 F.2d at 412. We conclude that PTC has not made the required showing. Accordingly, the judgment of the District Court will be affirmed.

Nygaard, J. concurring in judgment; No. 03-3088

Although I concur with the judgment reached by the majority, I write separately because I disagree with the majority's analysis in Part III.B. of the Opinion. In that Part, the majority seeks guidance from regulations and case law as to whether Appellees are engaged in "interstate commerce." That inquiry, although scholarly and interesting, is not necessary to resolve this appeal.

Rather than probing the contours of interstate commerce within the meaning of the Motor Carrier Act, I would hold the plain language of the Act's jurisdictional statute to be dispositive. That statute gives the Secretary of Transportation the authority to establish qualifications and maximum hours for employees of a motor carrier-thereby triggering the Motor Carrier Act exemption-only "to the extent that passengers, property, or both, are transported by motor carrier. . . between a place in... a State and a place in another State." 49 D.S.C. §13501. As PTC ACCESS drivers, Appellees transport individuals from locations within Pennsylvania to other locations within Pennsylvania, without crossing state lines. They do not transport passengers "between a place in . . . a State and a place in another State." Id. Thus, the Secretary of Transportation has no power to establish Appellees' qualifications and maximum hours. Id. Absent this power, the Motor Carrier Act exemption does not apply and PTC must comply with the Fair Labor Standards Act's overtime pay rules. See 29 D.S.C. § 213(b)(l).

Neither the District Court in its order granting partial summary judgment, nor the parties in their briefs before us, relied upon the plain language of 49 D.S.C. § 13501. They assume instead, and the majority follows suit, that it is necessary to interpret the term "interstate commerce." This assumption is understandable, as it is derived from language in a Supreme Court opinion. In determining the applicability of the Motor Carrier Act exemption under different circumstances, the Court in *Levinson v. Spector Motor Service* held that the Interstate Commerce Commission (now the Secretary of Transportation) has the power

to establish qualifications and maximum hours of service for employees of a motor carrier whose employment "affects the safety of transportation . . . in interstate commerce." 330 U.S. 649, 687 (1947) (emphasis added). Relying on this language, the parties focus on the definition of "interstate commerce" and attempt to discern its meaning by referring to case law and regulatory definitions. The majority, in Part III.B. takes a similar approach-one I believe to be unnecessary.[11] The plain language of the Motor Carrier Act's jurisdictional. statute governs the Secretary of Transportation's authority to establish Appellees' qualifications and maximum hours of service. It is unambiguous and does not contain the term "interstate commerce." To the extent the definition of that term does have any relevance here, its proper understanding is found in a source not previously considered: the United States Code.

In 1947, the year the Supreme Court decided *Levinson*, the Motor Carrier Act contained a statutory definition of interstate commerce. See 49 U.S.C. § 303(a)(10) (940). It would appear that when the Court used the term, it did so pursuant to its understanding of the then-existing statutory definition. At the time the Court decided *Levinson*, the Motor Carrier Act defined

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[11] I recognize that I am rather lonesome in this view, in that other Courts of Appeal have also explored the scope of the Motor Carrier Act exemption via inquiry into the presence or absence of interstate commerce. See *Bilyou v. Dutchess Beer Distrib.*, Inc., 300 F.3d 217,223 (2d Cir. 2002); *Klitzke v. Steiner Corp.*, 110 F.3d 1465, 1470 (9th Cir. 1997); *Foxworthy v. Hiland Dairy Co.*, 997 F.2d 670,672 (10th Cir. 1993); *Beggs v. Kroger Co.*, 167 F.2d 700, 702-03 (8th Cir. 1948). In so doing, the Courts in each of these cases relied upon *Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1943). In *Walling*, the Supreme Court held that purely intrastate acts may constitute interstate commerce within the meaning of the Fair Labor Standards Act if the intrastate acts are part of a "practical continuity of movement" between states. Id. at 568. As the majority points out, however, the contours of interstate commerce under the Motor Carrier Act and the Fair Labor Standards Act are different. See 29 C.F.R. § 782.7(a). Thus, *Walling* has no bearing upon the scope of the Motor Carrier Act exemption. The Courts of Appeal relying upon the case to determine the scope of the exemption have done so in error.

"interstate commerce" as "commerce between any place in a State and any place in another State. . .whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water." Id. It is worthy of note that this definition is similar, albeit not identical, to the present day Motor Carrier Act jurisdictional statute found at 49 V.S.C. § 13501, which was added to the Act after the Court decided Levinson. But whether Appellees' employment would fall within the 1947 statutory definition is irrelevant, as that definition no longer exists in the United States Code. What does exist is the present day jurisdictional statute, the plain language of which resolves this appeal without the need for resort to regulatory definition or case law.

Because I would decide this issue upon the plain language of 49 V.S.C. § 13501, I do not join Part III.B. of the Opinion. With respect, I concur in the judgment.

APPENDIX B
DISTRICT COURT OPINION AND ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CAROL PACKARD, et al.	)	
	)	
Plaintiffs,	)	02-cv-89
	)	
v.	)	
	)	
PITTSBURGH TRANSPORTATION COMPANY,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER OF COURT

FACTUAL BACKGROUND

Pending before this Court are cross motions for summary judgment. Plaintiffs are currently or were previously employed by Defendant, Pittsburgh Transportation Co. ("PTC"), as ACCESS drivers, are represented for collective bargaining purposes by General Teamsters, Chauffeurs and Helpers Local Union No. 249, and are covered by a collective bargaining agreement between Local 249 and PTC. Pursuant to annual contracts between PTC and ACCESS Transportation Systems, Inc., ACCESS drivers transport elderly and disabled passengers to and from locations within Allegheny County, including the Pittsburgh International Airport, the Pittsburgh Amtrak station, and the Pittsburgh Greyhound Bus station. The trips made by plaintiffs to the airport, train station, and bus station were limited in number, particularly between January 1,

2000 and July 31,2002, when airport trips were made by a separate PTC company known as "Airbus".

Passengers must arrange for ACCESS trips at least one day in advance, and pay their drivers with tickets obtained in advance from the ACCESS office. These tickets are good only for the local ACCESS ride and do not cover any prior or subsequent journey by air, rail or bus. ACCESS drivers working for PTC are not required to hold commercial drivers licenses, nor are they required to maintain Department of Transportation ("DOT") log books. The ACCESS drivers do not operate vehicles whose weight exceeds 10,000 lbs., nor do they operate vehicles beyond state lines.

Since January 22, 1999, Plaintiffs worked in excess of 40 hours per week and were not compensated at the rate of time and one-half their regular hourly rate for all hours worked in excess of 40. In addition, ACCESS drivers are provided each day with a "manifest" detailing their schedule for that day, including times and pick-up and drop-off locations. When a gap, or "downtime" occurs, a driver must call the dispatcher at half hour intervals. The Plaintiffs allege that PTC pays drivers for interval time only when a call comes in and an additional trip is made, while the defendant alleges that they pay drivers for the interval time, regardless of whether an additional trip is made, so long as the drivers call each half hour.

PROCEDURAL BACKGROUND

The Complaint involves two alleged violations of the Fair Labor Standards Act ("FLSA"): Section 7 of the FLSA, 29 D.S.C. § 207, relating to overtime provisions, and Section 6 of the FLSA, 29 D.S.C. § 206, relating to minimum wage requirements. Pending before the Court are cross motions for summary judgment on these two issues. ill their motion concerning Section 207 claims, Plaintiffs contend that no dispute of material facts exists regarding the application of the Section 7 FLSA overtime provisions to

Plaintiffs and the failure of PTC to comply with those FLSA overtime provisions. Conversely, PTC, in its summary judgment motion, contends that Plaintiffs are subject to the power of the Secretary of Transportation to establish qualifications and maximum hours of service, and thus are exempt from the FLSA overtime provisions.

Additionally, in the summary judgment motions concerning Section 206 claims, while both parties agree that Plaintiffs are entitled to gap payments at no less than the minimum wage rate pursuant to Section 6 of the FLSA, 29 U.S.C. § 206, Plaintiffs contend in their motion for summary judgment that they have not been paid the "gap" pay, while PTC contends such payments have been made.

SUMMARY JUDGMENT LEGAL STANDARD

Summary judgment under Fed.R.Civ.P. 56(c) is appropriate "'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Woodside v. Sch. Dist. of Philadelphia Ed. of Educ.*, 248 F.3d 129, 130 (3d Cir. 2001) (quoting *Foehl v. United States*, 238 F.3d 474,477 (3d Cir.2001) (citations omitted". An issue of material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In deciding a summary judgment motion, a court must view the facts in the light most favorable to, draw all reasonable inferences, and resolve all doubts, in favor of the nonmoving party. *Doe v. County of Centre, PA*, 242 F.3d 437,446 (3d Cir. 2001); *Woodside*, 248 F.3d at 130; *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 151 (3d Cir. 1999). Further, the court must not engage in credibility determinations at the summary judgment stage. *Simpson*

v. Kay Jewelers, Div. of Sterling, Inc., 142 F.3d 639, 643 n. 3 (3d Cir. 1998) (quoting *Fuentes v. Perskie*, 32 F.3d 759, 762 n.l (3d Cir. 1994)).

LEGAL ISSUE AND STANDARDS

The main legal issue in this case is whether the overtime provisions set forth in Section 7 of the FLSA, 29 V.S.C. § 207, apply to the factual situation set forth in this case. PTC is exempt from Section 7 of the Secretary of Transportation has the power to set qualifications and maximum hours of service for ACCESS drivers because, when the Secretary has this power, the Motor Carrier Act ("MCA") exemption, 29 U.S.C. § 213(b)(1), applies. PTC carries the burden of proving that it is entitled to the MCA exemption, and the exemption must be construed narrowly against an employer asserting its application. *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190,206 (1966); *Arnold v. Ben Kanowsky, Inc.*, 361 V.S. 388, 392 (1960).

If PTC fails to establish that PTC is entitled to the exemption, under the FLSA Plaintiffs must be paid at least one and one half times their regular wage for all hours beyond 40 hours worked in one week. Section 207(a)(1) of Title 29 of the United States Code provides:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-halftimes the regular rate at which he is employed.

Several exceptions to this rule exist, including 29 V.S.C. § 213(b)(1), the MCA exemption, which removes employees from the scope of Section 207 when the Secretary of Transportation has the power to set the employees' qualifications and maximum hours of service pursuant to the provisions of Section 204 of the MCA [now 49 V.S.C. § 31502]. The Secretary of Transportation has this power over employees of motor carriers only when the employees engage in activities that affect the safety of operation of motor vehicles on the nation's highways. See *United States v. American Trucking Assns.*, 310 U.S. 534, 548 n.3 (1940) (not all employees are affected, only those who perform duties related to safety); 49 D.S.C. § 31502.[1] Further, the Secretary of Transportation has this power only when the motor carrier is transporting passengers or property moving in interstate commerce. See *Levinson v. Spector Motor Service*, 330 U.S. 649,665-66 (1947) (an employee's duties must involve transportation in interstate commerce); 49 D.S.C. § 13501.[2] As set forth in *Levinson*, 330 U.S. at 681, the purpose of

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[1] 49 U.S.C. § 31502 provides:

(a) Application. This section applies to transportation(1) described in sections 13501 and 13502 of this title;

(b) Motor carrier and private motor carrier requirements. The Secretary of Transportation may prescribe requirements for-

(1) qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier; and

(2) qualifications and maximum hours of service of employees of, and standards of equipment of, a motor private carrier, when needed to promote safety of operation.

[2] 249 U.S.C. § 13501 provides:

The Secretary and Board have jurisdiction, as specified in this part, over transportation by motor carrier and the procurement of that transportation, to the extent that passengers, property, or both, are transported by motor carrier (1) between a place in-

(A) a State and a place in another State;

(B) a State and another place in the same State through another State;

(C) the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States;

this exemption is to give full recognition to the safety goals of the MCA.

To establish which carrier employees the Secretary of Transportation has jurisdiction over, the Department of Labor ("DOL") has a two part test. The employee must be (1) employed by a motor carrier whose transportation of passengers or property by motor vehicle is governed by Section 31502, and (2) engaged in activities that directly affect the safety of operation of motor vehicles in the transportation on public highways of passengers or property in interstate or foreign commerce within the meaning of the MCA. 29 C.F.R. § 782.2 (internal citations omitted). Thus, in the context of this case, the ACCESS drivers must both engage in activities that directly affect the safety of motor vehicle operations and be involved in the interstate transport.

APPLICATION OF LAW TO UNDISPUTED FACTS OVERTIME PROVISIONS OF THE FLSA ISSUE

Safety

The second part of the test (i.e., the safety requirement) is easily satisfied under the facts of the instant case. In considering the safety requirement of the MCA, courts look to "the character of the activities rather than the proportion of either the employee's time or of his activities." *Levinson*, 330 U.S. at 674-75. Therefore, in this case, even though the trips made by ACCESS drivers to the airport, train station and bus station are isolated and infrequent, the character of the drivers' activities, which consists of controlling motor vehicles on the highway and loading passengers and their baggage, has a direct effect on safety of motor vehicle operations.

(D) the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or

(E) the United States and a place in a foreign country to the extent the transportation is in the United States; and (2) in a reservation under the exclusive jurisdiction of the United States or on a public highway.

In *Pyramid Motor Freight Corp. v. Ispass*, 330 U.S. 695 (1947), the United States Supreme Court recognized an exception to the application of the MCA. Under that exception, employees who handled freight before or after loading performed duties too "trivial, casual, or occasional" to affect safety and were not subject to the safety requirement. However, courts have generally held that the de minimus rule does not remove drivers from the control of the Secretary of Transportation because driving is inherently an activity that directly affects the safety of motor vehicle operations. See *Morris v. McComb*, 332 U.S. 422 (1947); *Friedrich v. U.S. Computer Services*, 974 F.2d 409 (3d Cir. 1992). The facts of the instant case do not fall within this narrow exception.

Interstate Transport

As to the first part of the test (i.e., the interstate transport requirement), PTC argues that the issue of whether ACCESS drivers are involved in interstate commerce so as to exempt them from the FLSA's overtime requirements has already been litigated and decided in PTC's favor in *Spivak v. Pittsburgh Transportation Co.*, No. 98 Civ. 984 (W.D. Pa. May 28, 1999). However, in the *Spivak* case, the parties accepted without debate that the interstate transport exemption set forth in 29 U.S.C. § 213(b)(1) generally applies to airport trips. Id. at 5 (stating that "[i]t also appears undisputed that the exemption under the MCA is applicable to those drivers that regularly service the Greater Pittsburgh International Airport since those assignments constitute interstate transportation."). The dispute in the *Spivak* case centered on whether the ACCESS drivers' activities were so minimal and isolated that they constituted a de minimus exception to MCA exemption. Thus, the issue that Plaintiffs raise in the instant action, whether local transport of passengers to and from the airport, train station, and bus station generally constitutes interstate transport, was never actually decided in the *Spivak* case.

Examination of the applicable law indicates that interstate commerce is defined by the DOT as trade, traffic, or transportation that crosses State lines, or is between two places in a State as part of trade, traffic, or transportation originating or terminating outside the State. 49 C.F.R. § 390.5. Once an article has begun to move in trade from one State to another, interstate commerce commences. *The Daniel Ball*, 77 U.S. 557, 565 (1870). The character of the transaction does not change, even if several different and independent agencies are employed in transporting the article; some acting entirely within a single State. Id.

Applying this rationale to motor carriers, the DOL explains that if the article of transportation is moving in interstate commerce, the fact that other carriers transport it out of or into the State is not material. 29 C.F.R. § 782.7. Rather, the standard for determining whether an article of transportation is moving in interstate commerce is "practical continuity of movement" across State lines from the point of origin to the point of destination. Id.

In *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), the United States Supreme Court held that taxicabs shuttling passengers between two interstate railroad stations within the same State constituted interstate commerce because continuity of movement existed in that the taxi rides were immediately preceded and followed by interstate train trip. In contrast, the Supreme Court held that taxicabs shuttling passengers between interstate railroad stations and other destinations within the same State did not constitute interstate commerce because continuity of movement did not exist in that the passenger had complete freedom to arrive at or leave the railroad station however the passenger wished, with no effect on the passenger's interstate trip. According to the Supreme Court:

> What happens prior or subsequent to that rail journey, at least in the absence of some special arrangement, is not a constituent part of the

> interstate movement. The traveler has complete freedom to arrive at or leave the station by taxicab, trolley, bus, subway, elevated train, private automobile, his own two legs, or various other means of conveyance. Taxicab service is thus but one of many that may be used. It is contracted for independently of the railroad journey and may be utilized whenever the traveler so desires.

Id. at 232.

The United States Court of Appeals for the Third Circuit applied the *Yellow Cab* principle of continuity in *Southerland v. St. Croix Taxicab Association*, 315 F.2d 364 (3d Cir. 1963). The passengers in the *Southerland* case, on an all-expenses-paid interstate trip provided by their employer; possessed separate airline and taxi tickets, and the airline and taxi company were separate entities with no contractual relationship. Nevertheless, the Third Circuit considered the taxi transportation to involve interstate commerce because it was pre-arranged and paid in advance by the passengers' employer as an integral part of their all-expense interstate journey. As the Court explained:

> This is not a situation where the transportation from the airport to the hotel was local haulage in the sense that the traveler's interstate journey had ended at the airport at which point he could independently contract for his transportation service to his hotel by a conveyance of his choice. On the contrary, the transportation of these individuals had been arranged for them and paid in advance as an integral part of their all-expense interstate journey.

Id. at 369.

PTC argues that because ACCESS passengers suffer from physical constraints and must schedule their ACCESS ride in advance, they too lack complete freedom to arrive or leave the airport, train station, and bus station by whatever means they wish. The facts in this case, however, can be distinguished from those in the *Southerland* case. The *Southerland* passengers did not have freedom to select and pay for their taxi service either in advance or on the spot; instead, the employer made this decision for them when the employer provided them with the all expenses-paid package. The package included both airline tickets and taxi tickets, and if the passengers were to prefer another form of ground transportation service over the taxi company selected by the employer, they would have to pay for it themselves, and could not make substitutions into the package.

Here, if passengers want to use ACCESS service, they must schedule and pay in advance, but they have complete freedom not to use ACCESS at all; instead they can contact another company that provides service to the elderly and disabled. Their freedom to contact anyone of the various transportation services serving special needs passengers in the Pittsburgh area is no different than the freedom of non-elderly, non-disabled passengers to contact anyone of the various traditional ground transportation services serving the Pittsburgh area. The autonomy of ACCESS users to schedule local transportation in advance is no less than that of traditional ground transportation users who schedule local transportation in advance merely to avoid the delay involved in contracting for local transportation on the spot.

The DOL, in consultation with the DOT, addressed the issue of "practical continuity of movement" as applied to intrastate bus drivers in a 1999 opinion letter, which adopted the reasoning of a 1974 DOT ruling. In the letter, John R. Fraser, Acting Administrator of the Wage and Hour Division, U.S. Department of Labor, asserts that intrastate bus drivers would always be eligible

for FLSA overtime compensation, except in one situation not applicable here. According to the letter:

> Section 204 [the MCA exemption] [49 US.C. § 31502] does not apply merely because the operator makes stops at airports, railroad stations or bus depots and picks up passengers who have had or will have a prior or subsequent interstate journey. The only case in which section 204 would apply to a local bus operation transporting passengers who have made or will make a prior or subsequent journey across a State line is one in which there is a through ticketing arrangement under which the passengers purchase a single ticket which is good for both the local bus ride and the subsequent interstate journey.

1999 WL 1002358 (DOL WAGE-HOUR). Although the United States Court of Appeals for the Third Circuit in the *Friedrich* case, 974 F.2d at 411, held that the DOT, not the DOL, has authority to interpret the DOT's power under the MCA, the DOL's interpretation must be given deference because the DOL and the DOT agree on the interpretation. Here, no "through ticketing" arrangement covering both interstate and local travel exists for ACCESS passengers. Instead, contracts between PTC and ACCESS provide for cash payments from the passenger to PTC for airport trips, and through PTC's Airbus division for years 2000 through 2002. For these reasons, ACCESS drivers are not employed in the operation of a motor carrier involved in interstate transport, and thus the MCA exemption does not apply. Therefore, PTC has failed to prove that PTC is entitled to the exemption under the undisputed facts in this case. Accordingly, summary judgment is granted on the overtime pay issue in favor of Plaintiffs.

GAP TIME PAY ISSUE

Plaintiffs next allege that PTC violated Section 6 of the FLSA, 29 U.S.C. § 206, which requires that employees be compensated for all hours worked at a rate no less than the minimum wage rate. The DOL explains that all employee who is required to remain on call is considered "working", and thus should be paid, if he cannot use the time effectively for his own purposes. 29 C.F.R. § 785.17.

When a gap, or "downtime" occurs in an ACCESS driver's schedule, that driver must call the dispatcher at half hour intervals. Plaintiffs allege that PTC pays drivers for interval time only when a call comes in and an additional trip is made, while the PTC alleges that it pays drivers for the interval time, regardless of whether an additional trip is made, so long as the drivers call each half hour. PTC further alleges that if drivers find problems with their pay, they must address it through the grievance procedure specified in the collective bargaining agreement. Payment during "downtime" therefore represents a genuine dispute of material fact, preventing the Court from deciding the issue of whether PTC is liable for uncompensated "gap-time" pay as a matter of law.

However, because *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965), holds that employees wishing to redress grievances must attempt use of the grievance procedure agreed upon by employer and employees' union in cases involving federal labor law, this claim will be dismissed because the issue must first be handled through the collective bargaining grievance procedure.

SO ORDERED this 2nd day of June, 2003.

/s/ Arthur J. Schwab
United States District Judge

cc: All counsel of record as listed below

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CAROL PACKARD, et al.	)	
	)	
Plaintiffs,	)	02-cv-89
	)	
v.	)	
	)	
PITTSBURGH TRANSPORTATION COMPANY,	)	
	)	
Defendant.	)	

ORDER OF COURT

AND NOW, this 2nd day of June, 2003, upon consideration of Plaintiffs' Motion for Summary Judgment (doc no. 25) and Defendant PTC's Motion for Summary Judgment (doc no. 31), it is hereby ORDERED that:

Judgment be entered in favor of Plaintiffs and against Defendant on the issue of liability as to the FLSA overtime claims (Section 7 of the FLSA);

As to the issue of damages under the FLSA overtime claims, the parties shall conduct a meeting to reach an agreement on the amount of damages on or before June 13,2003; if parties are unable to agree upon the amount of damages, they shall select a Special Master to perform damage calculations which task shall be completed by June 20,2003; and if the parties cannot reach such an agreement on the amount of damages and cannot agree on a Special Master, counsel for the parties shall meet with the Court in person on June 16, 2003 at 11 :45 AM; and

The gap payment claims (Section 6 of the FLSA) are dismissed, since the matter should be handled through the grievance procedure specified in the collective bargaining agreement.

SO ORDERED this 2nd day of June, 2003.

/s/ Arthur J. Schwab
United States District Judge

cc: All counsel of record as listed below

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APPENDIX C
DISTRICT COURT ENTRY OF JUDGMENT

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CLERK'S OFFICE
United States District Court
for Western Pennsylvania

Civil Action No. 2:02-cv-00089
PACKARD v. PITTSBURGH TRANSPORT

There was entered on the docket July 1, 2003, a judgment.

/s/ Robert Barth, CLERK

APPENDIX D
DISTRICT COURT ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION TO TAKE INTERLOCUTORY APPEAL

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CAROL PACKARD, et al.	)	
	)	
Plaintiffs,	)	02-cv-89
	)	
v.	)	
	)	
PITTSBURGH TRANSPORTATIONCOMPANY,	)	
	)	
Defendant.	)	

ORDER OF COURT

AND NOW this 16th day of June, 2003, upon consideration of the within Motion for Reconsideration (doc. no. 37), it is hereby ORDERED, ADJUDGED and DECREED that said Motion is denied. Motion for Permission to Take Interlocutory Appeal (doc. no. 38 also is denied.

BY THE COURT:

/s/Arthur J. Schwab, J.

APPENDIX E
DISTRICT COURT ORDER AND OPINION ON DAMAGES

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CAROL PACKARD, et al.	)	
	)	
Plaintiffs,	)	02-cv-89
	)	
v.	)	
	)	
PITTSBURGH TRANSPORTATIONCOMPANY,	)	
	)	
Defendant.	)	

ORDER OF COURT

AND NOW, this 30th day of June, 2003, upon consideration of the outstanding issues of (1) compensatory damages; (2) liquidated damages; and (3) attorney's fees and costs, it is hereby

ORDERED that:

(1) Judgment be entered in favor of Plaintiffs and against Defendant on the issue of compensatory damages in the amount of $97,129.28; (2) judgment be entered in favor of Plaintiffs and against Defendant on the issue of liquidated damages in the amount of $48,564.64 owed to Plaintiffs, and (3) judgment be entered in favor of Plaintiffs and in favor of Defendant on the issue of attorney's fees and costs in the amount of $34,918.42 owed to Plaintiffs.

SO ORDERED this 30th day of June, 2003.

/s/ Arthur J. Schwab
United States District Judge

cc: All counsel of record as listed below

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CAROL PACKARD, et al.	)	
	)	
Plaintiffs,	)	02-cv-89
	)	
vi.	)	
	)	
PITTSBURGH TRANSPORTATIONCOMPANY,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER OF THE COURT

By Memorandum Opinion and Order of June 2, 2003 (doc. no. 36), this Court granted in part Plaintiffs' Motion for Summary Judgment (doc. no. 25), finding that Pittsburgh Transportation Company violated the maximum hours and overtime pay provision of the Fair Labor Standards Act [FLSA], Section 7, codified at 29 U.S.C. § 207. This Court also denied in part Plaintiffs' Motion for Summary Judgment (doc. no. 25), dismissing Plaintiffs' claim for "gap-time" pay under the Section 6 of the FLSA, codified at 29 D.S.C. § 206. Three issues remain in the case: (1) compensatory damages, (2) liquidated damages, and (3) attorney's fees and costs.

COMPENSATORY DAMAGES

The parties have stipulated that the amount of compensatory damages are $97,129.28. Accordingly, Plaintiffs are awarded $97,129.28 in compensatory damages.

LIQUIDATED DAMAGES

Plaintiffs that are owed unpaid overtime compensation are entitled to liquidated damages in an amount equaling the unpaid overtime compensation owed by the defendant. 29 U.S.C.A. § 216(b) (1998).[1] However, the Portal-to-Portal Act, codified at 29 U.S.C. §§ 259 and 260, provides for a mitigation of liquidated damages if the defendant can show that it acted in good faith and that the mistake was reasonable.[2] To mitigate its damages the employer must show both that it acted in good faith, and that the mistake was reasonable. *Williams v. Tri-County Growers, Inc.*, 747 F.2d 121, 129 (3d Cir. 1984).

The good faith requirement is a subjective requirement for mitigation. *Brooks v. Village of Ridge Field Park*, 185 F.3d 130, 137 (3d Cir. 1999) (citing *Martin v. Cooper Elec. Supply Co.*, 940 F .2d 896, 907-908 (3d Cir. 1991)). Under that requirement, for an employer to have acted in good faith, the court must find that it had "an honest intention to ascertain and follow the dictates of the FLSA." *Brooks*, 185 F.3d at 137 (quoting *Marshall v. Brunner*, 668 F.2d 748, 753 (3d Cir. 1982)).

Then, to determine whether the reasonableness requirement is satisfied, the court must assess the employer's conduct using an objective standard. Brooks, 185 F.3d at 137. The court cannot deny

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[1] "Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . ." 29 U.S.C.A. § 216(b).

[2] "[I]f the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title." 29 U.S.C.A. § 260 (1998).

liquidated damages to a party unless the employer "come[s] forward with plain and substantial evidence to satisfy the good faith and reasonableness requirements." Id. (citing *Martin*, 940 F.2d at 907-908). "Ignorance alone will not exonerate the employer under the objective reasonableness test." *Brooks*, 185 F.3d at 137.

After reviewing the affidavits filed by the parties, and after reviewing again the underlying motions for summary judgment, opposition thereto, and the related memoranda, the Court finds that Defendant in part, but not in whole, satisfied the requirements for mitigation of liquidated damages, and the Court, in its discretion, awards liquidated damages to Plaintiffs in the amount of 50% of the compensatory damages. Accordingly, Plaintiffs are awarded $48,564.64 in liquidated damages.

ATTORNEY'S FEES

Under Section 16(b) of the FLSA (29 U.S.C.A. § 216(b)), successful plaintiffs are entitled to reasonable attorney's fees. *Loughner v. University of Pittsburgh*, 260 F.3d 173, 177 (3d Cir. 2001). That section of the FLSA provides that "[t]he court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C.A. § 216(b).

In Pennsylvania, reasonable attorney's fees are determined through the use of the "lodestar" formula, which calculates fees by multiplying reasonable hours employed by the number of hours expended. *Loughner*, 260 F.3d at 177-78. "The applicant has the burden of proving that the attorney's fees requested are reasonable." *Loughner*, 260 F.3d. at 178 (quoting *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 at 564 (1986)). The court should determine whether the fees and expended hours claimed are reasonable given the issues involved in each individual case. In that determination, "the District Court has a positive and affirmative function in the fee fixing process,

not merely a passive role." *Loughner*, 260 F.3d at 178. However, the court cannot reduce the attorney's fees for reasons not brought up by the opposing party. Id. at 178 (citing *Rode v. Dellarciprete*, 892 F .2d 1177, 1183 (3d Cir.1990)).

In addition to finding that the fees and the number of hours expended were reasonable, the court must also consider the rest of the twelve "Johnson Factors" when calculating reasonable attorney's fees.[3] *Hensley v. Eckerhart*, 461 U.S. 424, 428-29 (1983). In doing so, "the District

Court should make clear that it has considered the relationship between the amount of the fee award and the results obtained." Hensley. 461 U.S. at 437. The court should not award attorney's fees for the unsuccessful claims made by the applicant. Therefore, the attorney's fees should be "reduce[d] by the number of hours spent litigating claims on which the party did not succeed, that were distinct from the claims on which the party did succeed, and for which the fee petition inadequately documents the hours claimed." *Loughner*, 260 F.3d at 178.

Based upon the Court's review of the pleadings filed in this case as to the work expended on Plaintiffs' claims and the Court's consideration of the relationship between the fee award and the results obtained by Plaintiffs, the Court finds that there was adequate documentation submitted by Plaintiffs' counsel and that the hours expended and the hourly fee were reasonable. While in

---

[3] The Johnson Factors: "The time and labor required. . . .The novelty and difficulty of the questions. . . . The skill requisite to perform the legal service properly. . . .The preclusion of other employment by the attorney due to acceptance of the case. . . .The customary fee. . . .Whether the fee is fixed or contingent. . . .Time limitations imposed by the client or the circumstances. . . .The amount involved and the results obtained. . . .The experience, reputation, and ability of the attorneys. . . .The "undesirability" of the case. . . .The nature and length of the professional relationship with the client. . . .Awards in similar cases. . . ." Johnson v. Georgia Highway Express, 488 F.2d 714, 717-20 (5th Cir.1974).

its June 2, 2003 Memorandum Opinion and Order (doc. no. 36) this Court granted compensatory damages to Plaintiffs pursuant to Section 7 of the FLSA (29 V.S.C. § 207), that same Order dismissed Plaintiffs' claims for gap payments under Section 6 of the FLSA, (29 V.S.C. § 206). Accordingly, the Court, in its discretion, reduces Plaintiffs' attorney's fees of $41,550.00 by 20% to $33,240.00 plus $1,678.42 in costs due to unsuccessful claims. Therefore, the Court orders Defendant to pay Plaintiffs $34,918.42 in attorney's fees and costs.

SUMMARY

In conclusion, the Court awards Plaintiffs the following: $97,129.28 in compensatory damages, $48,564.64 in liquidated damages, and $34,918.42 in attorney's fees and costs.

SO ORDERED this 30th day of June, 2003.

/s/ Arthur J. Schwab
United States District Judge

cc: All counsel of record as listed below

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APPENDIX F
DISTRICT COURT ORDER AMENDING DAMAGES

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CAROL PACKARD, et al.	)	
	)	
Plaintiffs,	)	02-cv-89
	)	
v.	)	
	)	
PITTSBURGH TRANSPORTATION COMPANY,	)	
	)	
Defendant.	)	

ORDER OF COURT

AND NOW, upon consideration of Plaintiffs' Motion to Amend Judgment on the Issue of Compensatory Damages and Liquidated Damages (doc no. 53) and memorandum of law in support, and having been advised by defendant that it will not be filing a response to said motion, IT IS HEREBY ORDERED that said motion is GRANTED, and the Court's Judgment of June 30, 2003, will be amended. Accordingly,

IT IS HEREBY ORDERED that:

1. Judgment is entered in favor of plaintiffs and against defendant on the issue of compensatory damages in the amount of $120,796.96;

2. Judgment is entered in favor of plaintiffs and against defendant on the issue of liquidated damages in the amount of $60,398.48; and

3. Judgment is entered in favor of plaintiffs and in favor of defendant on the issue of attorney's fees and costs in the amount of $34,918.42 owed to plaintiffs.

SO ORDERED this 15th day of July, 2003.

/s/ Arthur J. Schwab
United States District Judge

cc: All counsel of record as listed below

Ernest B. Orsatti, Esquire
Jubelirer, Pass & Intrieri
219 Fort Pitt Boulevard
Pittsburgh, PA 15222

Ray F. Middleman, Esquire
Malone, Larchuk & Middleman
Northridge Office Plaza
117 VIP Drive
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APPENDIX G
DISTRICT COURT ORDER GRANTING MOTION FOR STAY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CAROL PACKARD, et al.	)	
	)	
Plaintiffs,	)	02-cv-89
	)	
v.	)	
	)	
PITTSBURGH TRANSPORTATION COMPANY,	)	
	)	
Defendant.	)	

ORDER OF COURT

AND NOW, upon consideration of defendants' Motion for Stay upon Appeal (Document No. 59) and plaintiffs' response thereto, the Court will GRANT the motion in part, to the extent it requests, in the alternative, a stay upon posting of a supersedeas bond pursuant to Fed.R.Civ.P. 62(d), and will DENY the motion in part, to the extent it seeks a stay without an appropriate bond. Accordingly, It is HEREBY ORDERED that the Court's judgment entered July 15,2003 is STAYED pending appeal, conditioned upon defendants' posting of a bond pursuant to Fed.R.Civ.P. 65(d), in form and manner acceptable to the Clerk of Court, in the amount of $216,000.00.

SO ORDERED this 23rd day of July, 2003.

/s/ Arthur J. Schwab
United States District Judge

cc: All counsel of record as listed below

Ernest B. Orsatti, Esquire
Jubelirer, Pass & Intrieri
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APPENDIX H
COURT OF APPEALS ORDER DENYING PETITION FOR REHEARING EN BANC

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-3088

CAROL PACKARD; JAMES SINCLAIR; HOWARD BOOKER; FLORENCE MARIE CAMP; EMANUEL A. BRATTEN; RONALD E. DOMINICI; CHARLES R. ROTHERT, SR.; RAYMOND DAVIS; DONALD S. SPADE; BEVERLY J. BENNETT; RANDER J. THOMPSON; DARRYL SIGEL; LA VERA RAWLINGS; LEROY F. WISE; DAVID L. MORRIS; EDWARD R. CROSBY; GERALDINE REINHEIMER; PATRICIA ZILCH; SHANNON MCGRATH; DARRYL TURNER; NORBERT G. ABEL

v.

PITTSBURGH TRANSPORTATION COMPANY,

Appellant

On Appeal from the United States District Court for the Western District of Pennsylvania (Dist. Ct. Case No. 02-cv-00089)

SUR PETITION FOR REHEARING

BEFORE: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH FISHER and VAN ANTWERPEN, Circuit Judges)[1]

---

[1] Judge Richard L. Nygaard assumed senior status on July 9,2005.

The Petition for rehearing filed by the Appellant in the above-entitled matter having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en bane, the Petition for Rehearing is hereby DENIED.

It is so ordered.

By the Court,

/s/ Richard L. Nygaard
United States Circuit Judge

DATED: November 14,2005

ARL/cc: RFM; TRS; EBO

APPENDIX I
COURT OF APPEALS ORDER GRANTING MOTION TO STAY MANDATE

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

November 25, 2005

Docket No. 03-3088

CAROL PACKARD, ET. AL.

v.

PITTSBURGH TRANSPORTATION COMPANY, Appellant
(Middle District of Pennsylvania Civil No. 02-cv-00089)

Present: **NYGAARD, GARTH, Circuit Judges and POLLAK, District Judge**

Motion by Appellant Pittsburgh Transportation Co for Ninety-Day Stay Of the Mandate to Permit the filing of a Petition for Certiorari to the Supreme Court of the United States.

Published Opinion filed: 08/12/05 /s/Aina R. Laws/par
Case Manager: 267-299-4957

ORDER

The foregoing motion is granted.

By the Court,

/s/ Richard L. Nygaard Circuit Judge

Dated: December 2, 2005
ARL/cc: RFM; EBO; TRS

APPENDIX J
SPIVAK v. PITTSBURGH TRANSPORTATION COMPANY, Civ. Act. No. 98-984 (W.D. Pa. May 28, 1999)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MACHALL SPIVAK,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No. 98-984
	)	
PITTSBURGH TRANSPORTATION COMPANY,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION

I. Recommendation

It is respectfully recommended that plaintiff s motion for summary judgment (Docket No. 7) be denied and that defendant's motion for summary judgment (Docket No. 13) be granted.

II. Report

Presently before this Court for disposition are cross motions for summary judgment brought by the parties, plaintiff Machall Spivak ("Spivak") and defendant Pittsburgh Transportation Company ("PTC").

Plaintiff commenced this action under 29 U.S.C. § 207 (a)(1) and 29 U.S.C. § 216 (b) of the Fair Labor Standards Act ("FLSA") claiming that defendant has failed to properly

compensate him for time he has worked in excess of forty hours per week.

The record demonstrates that PTC is in the business of transportation whereby it contracts with various hospitals, businesses, schools, and other entities to provide transportation.[1] In particular, PTC has a contract with ACCESS Transportation Systems, Inc., under which it provides transportation to special needs ACCESS customers, their attendants, and companions for any and all trips that either originate or terminate in specified zones within Allegheny County, including the Greater Pittsburgh International Airport.[2]

Plaintiff worked for PTC from 1991 to 1997.[3] On June 5, 1995, plaintiff began working as an ACCESS driver which required him to be trained in operating a wheelchair lift, loading and unloading passengers, and attending to the needs of the infirm and disabled.[4] Plaintiff was one of twenty ACCESS drivers working for PTC and, like all the drivers, received his manifest each morning with a list of trip assignments for the day. These assignments are made indiscriminantly.[5] As well, each driver maintains radio contact with PTC throughout the day and may be given additional assignments that are received during the day depending on their proximity to the client.[6]

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[1] See MacLennan Declaration, 11 II. The Declaration of Arch MacLennan, the Vice President of Human Resources at PTC, has been submitted with Defendant's Statement of Undisputed Material Facts as Appendix 2 (Docket No. 12).

[2] Id. at ¶¶ 6, 7. See Spivak Deposition. pp. 8. 10, 14,24-25. The transcript of plaintiff's deposition has been submitted in support of Plaintiffs Motion for Summary Judgment as Exhibit 5 (Docket No. 10).

[3] Id. at ¶ 4.

[4] Id. at 5, 8.

[5] Id. at ¶ 5, 9.

[6] Id. at ¶ 9.

While employed as an ACCESS driver, plaintiff made three trips to the Greater Pittsburgh International Airport.[7] It also appears undisputed that plaintiff often worked in excess of the regular 40 hour work week for which he received his normal hourly rate of $8.60 an hour.[8] Plaintiff filed the instant complaint on June 5, 1998, alleging that under the FLSA he is entitled to overtime pay, or one and one-halftimes his regular pay, for the hours that he worked in excess of the regular forty hour work week. Defendant filed a motion for summary judgment arguing that the facts which demonstrate that plaintiff is exempt from overtime pay under the terms of the Motor Carrier Act are not in dispute thereby entitling it to summary judgment. Plaintiff counters that the exemption at issue is not applicable to the facts of this case and that because defendant has otherwise admitted the allegations in the complaint that it is he who is entitled to summary judgment.

Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R.Civ. P. 56(c). See Marzano v. Computer Science Corp. Inc., 91 F.3d 497 (3d Cir. 1996). In deciding a motion for summary judgment the court must view all inferences in a light most favorable to the non- moving party. Id. at 501; citing Armbruster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir. 1994). The non-moving party, however, may not rely on bare assertions, conclusory allegations or mere suspicions to support its claim but must demonstrate by record evidence, the meritorious nature of the claim. Orsatti v. New Jersey, 71 F.3d 480 (3d Cir. 1995).

Section 207 of the FLSA provides in pertinent part that:

(a) Employees engaged in interstate commerce. . . .

---

[7] See Spivak Deposition, pp. 11-12, 17-19.

[8] See Complaint ¶¶ 6, 7 (Docket No. 1); Answer to Complaint, ¶ 7 (Docket No. 3); MacLennan Deposition, ¶ 15.

> (I) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207 (a)(1). See Friedrich v. U.S. Computer Services, 974 F.2d 409, 412 (3d Cir. 1992); Dole v. Solid Waste Services. Inc., 733 F. Supp. 895,925 (E.D. Pa. 1989), affirmed, 897 F.2d 521 (3d Cir.), cert. denied, 497 U.S. 1024 (1990). Section 207 does not apply, however, to "any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of Title 49 [("the Motor Carrier Act")]...." 29 U.S.C. § 213 (b)(1). Under the Motor Carrier Act ("MCA"), "[t]he Secretary of Transportation may prescribe requirements for. . . qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier...." 49 U.S.C. § 31502 (b)(1). The Court of Appeals for the Third Circuit has described the interplay between the two statutes as follows:

> Congress enacted the MCA in 1935, to promote efficiency, economy, and safety ill the rapidly burgeoning motor transportation industry. . . . To advance these goals, the MCA gave the Interstate Commerce Commission (ICC) authority to establish requirements for recordkeeping, safety of operation. qualifications, and maximum hours of work for "common carriers" and "contract carriers" by motor vehicle. . . .

> In 1938, Congress enacted the FLSA to protect covered workers from substandard wages and oppressive working hours. . . . The FLSA required employers to compensate such employees at a minimum of one and one-half times their standard hourly wages for time worked per week in excess of forty hours. See 29 U.S.C. § 207 (a)(1). Congress ensured that the regulatory jurisdiction under the MCA and the FLSA would not overlap by providing that the FLSA did not apply where the ICC already had power to set maximum hours. . .. Specifically, the FLSA exempted from its overtime requirements "any employee with respect to whom the ICC has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49." See 29 U.S.C. § 213 (b)(1). It is the employer's burden to affirmatively prove that its employees come within the scope of the overtime exemption, and any exemption from the Act must be proven plainly and unmistakably.

Friedrich v. U.S. Computer Services, supra.[9]

In the instant case, it appears undisputed that plaintiff frequently worked more than the normal forty-hour work week and that he was only compensated for those hours at his regular pay of $8.60 an hour. It also appears undisputed that the exemption under the MCA is applicable to those drivers that regularly service the Greater Pittsburgh International Airport since those assignments

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[9] It also appears that in 1966 Congress transferred the authority to regulate under § 304 of the MCA from the ICC to the Department of Transportation ("DOT"), and in 1983, Congress repealed § 304 and recodified the section without substantive change as 49 U.S.C. § 3102.

constitute interstate transportation.[10] Because PTC's contract with ACCESS specifically contemplates trips to the airport and because, by his own admission, plaintiff made trips to the airport, it would appear that he falls under the exemption and, therefore, is not entitled to time and one-half for the hours worked in excess of forty hours.

Plaintiff nevertheless argues that because the number of trips he made to the airport were so few that it cannot be said that his regular duties relate to interstate commerce thereby precluding a finding that his work is exempted from the overtime requirements under the FLSA. Defendant counters that the number of trips plaintiff made to the airport himself is not significant but, rather, the Court must look to the number of trips to the airport made by the entire pool of ACCESS drivers.

Although the United States Supreme Court has recognized a de minimis exception to the application of the MCA, it is inapplicable where a substantial part of the employees' interstate activities affect the safety of interstate motor carrier operations. Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695, 708-709 (1947). Thus, only where the employees' activities while engaging in interstate commerce are considered too "trivial, casual or occasional" to affect safety will they be considered outside the authority of the MCA. Id. See Friedrich v. U.S. Computer Services, supra at 416-17. The question is not whether a substantial part of all of the employees responsibilities affect interstate commerce but rather whether a substantial part of the employees activities which affect interstate commerce also affect safety. Id. at 418. See Thomas v. Wichita Coca-Cola Bottling Co., 968 F.2d 1022, 1025-26 (10th Cir.), cert. denied, 506 U.S. 1013 (1992);

---

[10] The Federal Motor carrier Safety Regulations define "interstate commerce" as trade, traffic or transportation in the United States" that: (1) crosses state lines; or (2) is "[b]etween two places in a State as part of trade, traffic, or transportation originating or terminating outside the State or the United States." 49 C.F.R. § 390.5.

Crooker v. Sexton Motors, Inc., 469 F.2d 206, 209 (1st Cir. 1972); Troutt v. Stavola Bros., Inc., 905 F. Supp. 295, 299 (M.D.N.C. 1995), affirmed, 107 F.3d 1104 (1997). See also Levinson v. Spector Motor Service, 330 U.S. 649, 674-75 (1947)("it is the character of the activities rather than the portion of either the employees time or of his activities that determines the actual need for the [Secretary of Transportation] power to establish reasonable requirements with respect to qualifications, maximum hours of service, safety of operation and equipment.") Accordingly, courts have generally held that the de minimus rule does not remove drivers from the control of the Secretary of Transportation since, while driving in interstate commerce, the safety of motor vehicle operation is directly affected. See Morris v. McComb, 332 U.S. 422 (1947); Thomas v. Wichita Coca-Cola Bottling Co., supra; Crooker v. Sexton Motors. Inc., supra at 210 ("The activities of one who drives in interstate travel, however frequently or infrequently, are not trivial( ]" as "[s]uch activities directly affect the safety of motor vehicle operations."). See also Friedrich v. U.S. Computer Services, supra at 417 n. 10.

Here, while interstate activity may have been only a small fraction of plaintiffs and the other ACCESS driver's duties, it is clear that while they were driving in interstate commerce that the safety of interstate operations was directly affected. As such, the ACCESS drivers, including plaintiff, appear to fall under the control of the Secretary of Transportation and the MCA's exemption to the overtime requirement set forth in the FLSA applies. Moreover, plaintiff has not presented any evidence which appears to dispute that offered by defendant which demonstrates that the contract between PTC and ACCESS contemplates travel to and from the airport, that such trips are assigned indiscriminantly amongst the pool of ACCESS drivers, and that ACCESS drivers make approximately 5-10 trips to the airport per week. See Morris v. McComb, supra at 432-34; Dole v. Solid Waste Services. Inc., 733 F. Supp. 895,921 (E.D. Pa. 1989) citing Brennan v.

Schwerman Tr[illegible] [illegible]0 F.2d 1200 (4th Cir. 1976). Accordingly, defendant is [illegible] summary judgment.

For these reasons, it is recommended that plaintiffs motion for summary judgment (Docket No. 7) be denied and that defendant's motion for' summary judgment (Docket No. 13) be granted.

Within ten (10) days of being served with a copy, any party may serve and file written objections to this Report and Recommendation. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to file timely objections may constitute a waiver of any appellate rights.

Respectfully submitted,

/s/ROBERT C. MITCHELL,
United States Magistrate Judge

Dated: April 28, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MACHALL SPIVAK,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No. 98-984
	)	
PITTSBURGH TRANSPORTATION COMPANY,	)	
	)	
	)	
Defendant.	)	

ORDER

AND NOW, this 28th day of May, 1999, after the plaintiff, Machall Spivak, filed an action in the above-captioned case, and after cross motions for summary judgment were submitted by the parties, plaintiff Spivak and defendant Pittsburgh Transportation Company, and after a Report and Recommendation was filed by the United States Magistrate. Judge granting the parties ten days after being served with a copy to file written objections thereto, and upon consideration of the objections filed by plaintiff and the response to those objections filed by defendant, and upon independent review of the motions and the record and upon consideration of the Magistrate Judge's Report and Recommendation, which is adopted as the opinion of this Court,

IT IS ORDERED that plaintiff's motion for summary judgment (Docket No. 7) is denied and defendant's cross-motion for summary judgment (Docket No. 13) is granted.

/s/William L. Standish
United States District Judge.

(2)

No. 05-1045

In The Supreme Court of the United States

PITTSBURGH TRANSPORTATION CO.,

Petitioner,

v.

CAROL PACKARD, JAMES SINCLAIR, HOWARD BOOKER, FLORENCE MARIE CAMP, EMANUEL A. BRATTON, RONALD E. DOMINICI, CHARLES R. ROTHERT, SR., RAYMOND DAVIS, DONALD S. SPADE, BEVERLY J. BENNETT, RANDER J. THOMPSON, DARYL SIGEL, LaVERA RAWLINGS, LEROY F. WISE, DAVID L. MORRIS, EDWARD R. CROSBY, GERALDINE REINHEIMER, PATRICIA ZILCH, SHANNON McGRATH, DARRYL TURNER and NORBERT G. ABEL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

ERNEST B. ORSATTI
JUBELIRER, PASS & INTRIERI, P.C.
219 Fort Pitt Boulevard
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412-281-3850
Counsel for Respondents

DATED: March 15, 2006

QUESTION PRESENTED

Whether access drivers, who would ordinarily be eligible for overtime compensation under the fair labor standards act, become ineligible by virtue of a provision of the motor carriers act that vests authority in the secretary of transportation to regulate certain aspects of interstate transport.

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INTRODUCTION

Petitioner, Pittsburgh Transportation Co. (hereinafter sometimes referred to as "PTC"), has completely misstated the questions presented in its Petition. Respondents have characterized the issue exactly the way in which Judge Pollak characterized it, writing for the Panel majority in the Opinion under review. *Packard, et al. v. Pittsburgh Transportation Co.*, 418 F.3d 246, 248 (3d Cir. 2005). The issues raised by Petitioner were never raised in the District Court or in the Court of Appeals.

In the first question presented by Petitioner, PTC has grossly misrepresented the Third Circuit decision as holding that "through ticketing" is required for application of the Motor Carriers Act exemption, 29 U.S.C. §213(b)(1), to the Fair Labor Standards Act, 29 U.S.C. §207(a)(1). Judge Pollak expressly stated:

> Accordingly, we are of the view that the "through ticketing" test utilized by the District Court is not a legal standard that suffices to determine whether the MCA exemption is applicable to the ACCESS drivers. We turn then, to other sources of guidance.

418 F.3d at 253.

The Court then explained that it was following, rather than rejecting, this Court's decision in *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947). 418 F.3d at 256-257.

Petitioner also argues for the first time that *Charter Limousine v. Dade County Board of Commissioners*, 672 F.2d 586 (5th Cir. 1982), is contrary to the Third Circuit's decision in the instant case.

PTC attempts to create a split in the Circuits where none exists by misrepresenting the holdings of the *Charter* case and the Third Circuit decision in the instant case.

STATEMENT OF THE CASE

The underlying facts are not in dispute since both parties filed Motions for Summary Judgment with respect to liability. The best description of the case is set forth by Judge Pollak:

> PTC's ACCESS service, not available to the general public, provides transportation to elderly and disabled persons who are unable to use other forms of public transportation. Under a contract with ACCESS Transportation Systems, Inc., a federally funded program to provide such services, PTC's ACCESS program serves roughly 5,000 people with disabilities and 125,000 seniors. Most of these passengers have "unconditional" eligibility, which requires a certification of need based on review by a special panel, while others are eligible based on certain more temporary conditions.
>
> PTC provides ACCESS service within a defined service area in Allegheny County that includes the Pittsburgh Amtrak and Greyhound stations. PTC also provides some ACCESS service to and from the Pittsburgh International Airport, which is outside its regular service area. PTC's ACCESS service operates entirely within Pennsylvania, and ACCESS drivers do not transport passengers across state lines. It is unclear what portion of ACCESS service involves train or bus terminals. Trips to the Airport are a very minor

part of ACCESS' aggregate operations, [footnote omitted], but is the case that most, if not all, of the ACCESS drivers have made at least a few trips to the Airport. Because PTC assigns the Airport trips indiscriminately along with other trips, any ACCESS driver may be called upon to drive such trips.

Unlike conventional bus systems, PTC's ACCESS service does not have regular, set routes, or set stops or schedules from day to day. Rather, PTC schedules passenger trips each day to provide the most efficient service possible. To use the service, eligible passengers must schedule their trips at least one day in advance, by telephoning schedulers at either PTC or ACCESS. Although limited same day trips may be scheduled when space is available, ACCESS drivers do not pick up or drop off passengers except as scheduled in advance to the central schedulers. A passenger purchases a ticket for the service in advance, presenting the ticket to the ACCESS driver as payment. Tickets for ACCESS service are not linked in any way to tickets for interstate travel, or indeed intrastate travel, on a non-ACCESS transit services basis.

Because PTC contends that its ACCESS drivers are excluded from the FLSA's overtime protection, it has refused to pay the drivers more than their ordinary hourly wage rate when they work more than forty hours per week. It is undisputed that the drivers regularly work over forty hours per week, and that they are entitled to recover overtime compensation for the excess hours if they are not subject to the FLSA's MCA exemption.

After the ACCESS drivers filed this action in the United States District Court for the Western District of Pennsylvania, seeking to confirm their

entitlement to FLSA overtime pay, both parties filed Motions for Partial Summary Judgment on the question of the drivers' entitlement to overtime protection. The District Court denied PTC's Motion, and granted the ACCESS drivers' Motion in part.

The District Court ruled that the ACCESS drivers were not excluded from the protections of the FLSA and remained entitled to overtime, because they were not within the Secretary of Transportation's authority to regulate interstate transport. According to the District Court, the ACCESS drivers were not engaged in interstate transport because the ACCESS service (which does not physically provide transport outside of Pennsylvania) does not involve "through ticketing" arrangements with interstate transport.

The court then entered final judgment for the ACCESS drivers, based on the parties' stipulation as to the amount of compensatory damages and the Court's determination of appropriate liquidated damages and attorney's fees. PTC timely filed this Appeal challenging the underlying liability determination.

The issues presented here have also been raised, but not decided, in three actions in the Western District of Pennsylvania involving ACCESS drivers for PTC and for another transportation company in the Pittsburgh area, Laidlaw Transportation, Inc. ("Laidlaw"). One of these actions, *Eugene J. Kott, et al. v. Pittsburgh Transportation Co.*, No. 02-0089, has been dismissed without prejudice pending the resolution of this Appeal. In *Spivak v. Pittsburgh Transportation Co.*, No. 98-984 (W.D. Pa. May 28, 1999), the District Court found that PTC could apply the MCA exemption to plaintiff Machall

> Spivak, an ACCESS driver. However, because Spivak did not dispute that he was engaged in interstate transportation while making Airport trips, the *Spivak* decision does not directly address the issues presented here.

415 F.3d at 248-250.

The Third Circuit panel affirmed the District Court judgment and PTC's request for re-argument was denied.

REASONS FOR DENYING THE PETITION

The decision below does not conflict with the decision of this Court, the Third Circuit, the Fifth Circuit, the United States Constitution, the Motor Carriers Act or Department of Transportation Regulations.

The Third Circuit has correctly construed the Motor Carriers Act exemption to the Fair Labor Standards Act to require Petitioner to pay overtime compensation to ACCESS drivers who work in excess of forty hours per week. The Court determined that ACCESS drivers' intrastate transportation of passengers is not in practical continuity with a larger interstate journey and therefore not covered by the Motor Carriers Act. 418 F.3d at 258.

There is no other appellate case directly on point. The District Court relied upon by Petitioner, *Spivak v. Pittsburgh Transportation Co.* (Civil Action No. 98-984, Appendix, p. 56a), is inapplicable because the plaintiff in that case did not dispute the fact that he was engaged in the interstate transportation of passengers (p. 60a-61a).

The Court below properly analyzed the appropriate case law and statutory law in light of the undisputed facts

and concluded that the Motor Carriers Act exemption to the Fair Labor Standards Act did not apply and that ACCESS drivers were entitled to overtime compensation.

I. THERE IS NO CIRCUIT SPLIT ON THE QUESTION PRESENTED

Petitioner disingenuously argues that the Third Circuit's ruling in the instant case conflicts with the Fifth Circuit decision in *Charter Limousine v. Dade County Board of Commissioners, supra*. The two cases are not similar in any material respect.

In *Charter*, the carrier brought an action against the County alleging violation of the Commerce Clause of the U.S. Constitution by the County's granting of an exclusive franchise to another company for ground transportation of passengers from an airport. Unlike the facts in the instant case, the exclusive right to provide the local transportation to the interstate traveler was granted to one carrier. The Court concluded:

> It is the conclusion of this Court that *Charter's* prearrangements place their operations within the stream of interstate commerce, even though they take place wholly within a single state. The Court concludes, as did the District Court, that the restrictions placed upon *Charter* by the Dade County Commissioner constitute an unreasonable burden on interstate commerce.

678 F.2d at 589. No such pre-arrangements exist in the instant case. This case did not analyze the question of application of the Motor Carriers Act.

No other case was cited by PTC in support of their argument of a split in the Circuits.

II. THE THIRD CIRCUIT DECISION HAS NO IMPACT ON THE AMERICANS WITH DISABILITIES ACT

The lower court's decision regarding the Motor Carriers Act exemption to the Fair Labor Standards Act has nothing to do with the Americans With Disabilities Act, 42 U.S.C. §12101, *et seq.*

PTC never raised this argument at the District Court level or at the Court of Appeals. In any event, the argument is meritless. PTC has grossly mischaracterized the Third Circuit decision. The Court never found that the Commerce Clause was not applicable. If they had, they could not have found the Fair Labor Standards Act, which is also constitutionally based upon the Commerce Clause, to apply. The Court below interpreted the *statutory* basis of the Motor Carriers Act as to not deprive the ACCESS drivers of application of the Fair Labor Standards Act. The term "interstate commerce" has different meanings in different statutes. Congress must have intended the Fair Labor Standards Act and the Motor Carriers Act to have two different bases of federal jurisdiction. Otherwise, the Motor Carriers Act would present a "Catch-22" situation. If it is shown that there is no interstate commerce sufficient to establish application of the Motor Carriers Act exemption, then the Fair Labor Standards Act would also not apply. Clearly, Congress did not intend such an absurd result.

The Americans With Disabilities Act has a broader definition of the concept of interstate commerce for purposes of exercising jurisdiction than that of the Motor Carriers Act. The Americans With Disabilities Act defines an employer subject to the Act at 42 U.S.C. §12111(5):

> Employer
>
> (A) In general
>
> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year, and any agent of such person.
>
> (B) Exceptions
>
> The term "employer" does not include –
>
> (i) The United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or
>
> (ii) A bona fide private membership club (other than a labor organization) that is exempt from taxation under Section 501(c) of Title 26.

As stated by Judge Nygaard in his concurring Opinion:

> Rather than probing the contours of interstate commerce within the meaning of the Motor Carriers Act, I would hold the plain language of the Act's jurisdictional statute to be dispositive. That statute gives the Secretary of Transportation the authority to establish qualifications and maximum hours for employees of a motor carrier – thereby triggering the Motor Carriers Act exemption – only "to the extent that passengers, properly, or both, are transported by motor carrier . . .